Voluntary Dismissals and the Evolution of Illinois’ Rule Against Claim-Splitting

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I. INTRODUCTION

The Illinois Constitution grants the state’s supreme court the authority to promulgate rules, which allow it to regulate the Illinois judicial system.1 Concurrently, the Illinois General Assembly is vested with the power to make statutory law.2 In some instances, these powers overlap. Such overlap occurred when the Illinois Supreme Court eroded protections afforded to


1. See ILL. CONST. art. II, § 1 (“The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.”).

2. See ILL. CONST. art. IV, § 1 (“The legislative power is vested in a General Assembly consisting of a Senate and a House of Representatives, elected by the electors from 59 Legislative Districts and 118 Representative Districts.”).
plaintiffs by Illinois’ voluntary dismissal and refiling statutes. In *Hudson v. City of Chicago*, the Illinois Supreme Court ruled that a plaintiff’s refiled lawsuit, which had previously been voluntarily dismissed without prejudice after a partial adjudication, was barred under the sister doctrines of res judicata and the rule against claim-splitting. In the wake of *Hudson* and its progeny, it is possible for attentive defense counsel to command an enormous amount of procedural leverage over a case while plaintiffs’ attorneys are faced with decreased rights and a sizeable legal malpractice trap.

This article tracks the history and evolution of the rule against claim-splitting pre- and post-*Hudson*. Figure One presents a basic claim-splitting family tree. It shows a main trunk, from which sprouts several branches and sub-branches. These branches represent different lines of jurisprudence implicating the doctrine. While not every Illinois claim-splitting case is discussed herein, this article will follow this tree from the mid-nineteenth century to the present day. Section II(A) will examine the evolution of the main trunk of the tree and will demonstrate the consistency with which the basic rule against claim-splitting has been applied by Illinois courts. Section II(B) will look at the so-called English Rule and how for some seventy years, Illinois actually had two parallel lines of claim-splitting law. Sections III and IV will look at how voluntary dismissals have converged with this doctrine to form a separate and expanding branch. Sections V and VI will examine *Hudson* and the shortcomings of the majority opinion as narrated by Chief Justice Thomas Kilbride. By telling the full story of Illinois’ rule against claim-splitting, it will be shown that: (1) the Illinois Supreme Court, in recent times, created two new broader species of claim-splitting involving voluntary dismissals, (2) it undermined the plain language and operative effect of section 5/2-1009 by judicial fiat, (3) after adopting a technical framework to evaluate claim-splitting cases involving voluntary dismissals,

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3. 735 ILL. COMP. STAT. 5/2-1009(a) (2005). For purposes of this article, subsection “(a)” of the statute is relevant. Subsection (a) states: “The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party’s attorney, upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.” *Id.* Section 5/13-217 states in part:

> In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if the action is voluntarily dismissed by the plaintiff . . . the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater . . . after the action is voluntarily dismissed by the plaintiff . . .


5. See infra Figure One.
the Illinois Supreme Court failed to follow its own test by refusing to apply certain exceptions to the rule (set forth in, and adopted from, the Restatement (Second) of Judgments), and (4) that the approach set forth in Hudson’s dissent is a more proper reading of claim-splitting law applied to voluntary dismissals. Section VII will examine how the appellate court’s panels have split on how to apply the Hudson ruling. Section VIII presents possible solutions aimed at clarifying voluntary-dismissal-type claim-splitting law by (a) proposing amendments to section 2-1009 that codify earlier case law and notions of judicial regulation, (b) urge the supreme court to retreat from the boundaries established in Hudson, and (c) provide practical suggestions that plaintiffs’ attorneys might use to protect their clients, and own interests.

II. THE HISTORY OF ILLINOIS’ RULE AGAINST CLAIM-SPLITTING; DEFINING AND REDEFINING THE BOUNDARIES

An overview of the history of Illinois claim-splitting jurisprudence reveals an ancient doctrine that has undergone dramatic evolution over the last century and a half. Before delving into this history, it is helpful to start with a basic understanding of what claim-splitting is. A concise definition may be found at section 25 of the Restatement (Second) of Judgments. The rule against claim-splitting applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action to (1) present evidence or grounds or theories of the case not presented in the first action, or (2) seek remedies or forms of relief not demanded in the first action.

Phrased another way, traditional claim-splitting—as it will be labeled in this article—is therefore characterized by the plaintiff’s failure to raise an issue or request a remedy when afforded the opportunity in their initial lawsuit. In many circumstances a traditional claim-splitting case will share both of these traits. The aversion to claim-splitting is incorporated into the underlying policy supporting res judicata. Res judicata will be triggered if a defendant establishes the elements of what this article will label the triple identity test: first there must have been a final judgment on the merits rendered by a court having jurisdiction; second, there must have been an iden-
tity of cause of action; and lastly, there must have been an identity of parties or their privies.10

A. TRADITIONAL CLAIM-SPLITTING CASES IN ILLINOIS

Illinois has historically adhered to the traditional form of the rule against claim-splitting.11 Two subcategories of claim-splitting can be identified. The first occurs when an affirmative act of the plaintiff results in a surrender of part of his or her cause of action.12 The second type might be thought of as claim-splitting by negligent or intentional omission.13

One of the earliest Illinois claim-splitting cases is Camp v. Morgan.14 Camp had obtained a judgment against Morgan for $100.65 plus costs of $39.86.15 Fee bills were issued against Morgan, and he later satisfied the judgment by turning over payment to the Sheriff of Pike County.16 This judgment was then reversed by the Illinois Supreme Court and Morgan proceeded to file suit in the Circuit Court of Scott County against Camp to recover the sum of the previously paid, but reversed, judgment.17 At trial, Morgan successfully demonstrated that he had paid the $100.65 but failed in his proof that he had also paid the costs and fees and subsequently withdrew that portion of his lawsuit.18 After judgment was entered on the $100.65, Morgan filed a second action to recover the costs and fees.19 This time, Morgan was able to prove that the fees and costs had been paid in the original lawsuit and judgment for $54.96 to Morgan was entered.20

On review in the supreme court, Morgan’s second lawsuit was reversed based in-part upon the rule against claim-splitting.21 Justice Walker held that “a plaintiff cannot so divide an entire demand, or cause of action, as to maintain several actions for its recovery. And if he sue and recover a judgment for a part only of such a claim, the remaining portion is barred by that recovery.”22 Morgan now had one adjudicated action for damages and

14. Id.
15. Id. at 256.
16. Id. at 256-57.
17. Id. at 257.
18. Id. at 257.
19. Id.
20. Camp, 21 Ill. at 257.
21. See id. at 257-58. Justice Walker first held that liability against Camp for fees could not lie with Camp, because it had been collected by the sheriff of Pike County, and that there was no evidence that Camp had any actual interest or control over it. See id.
22. Id. at 258.
one separate pending action for additional damages that arose out of the same bundled nucleus of fact.\textsuperscript{23}

Morgan’s mistake was that he first surrendered his claims for the recoupment of his costs and fees, and then proceeded to judgment on the remainder of the cause. Justice Walker continued: “The costs were as much a part of the judgment as are the damages in a recovery in debt; and the payment was as entire as the judgment itself.”\textsuperscript{24}

\textit{Camp} represents substantive claim-splitting by affirmative surrender. Morgan’s relinquishment of part of his claim left only one, for the $100.65, which was available for adjudication and later entry of judgment on this amount. This judgment effectively terminated all then-pending issues between the parties. In his closing remarks, Justice Walker provided a suggestion as to how Morgan should have proceeded:

When this demand was before the court for adjudication in the other case, Morgan, to have pursued his right of recovery on this portion of his claim, should have submitted to a non-suit, and having failed to do so, that judgment became a bar to a recovery of those costs in the case . . . .\textsuperscript{25}

A voluntary dismissal of the entire case prior to judgment might have saved the surrendered claim. Morgan could not later recapture what he lost. \textit{Camp} provides a simple example of how the rule against claim-splitting works as a defensive anti-recapture mechanism.

\textit{Hamilton v. Quimby & Co.},\textsuperscript{26} another seminal claim-splitting case, involved an action to set aside a conveyance of land to Quimby and to reinvest ownership in the same land to Hamilton. The complicated dispute between the parties originated when Hamilton procured two loans, Loans I and II, from Quimby.\textsuperscript{27} Promissory notes for Loan II were later conveyed by Quimby to one Dr. Bachelder.\textsuperscript{28} Hamilton subsequently sold eighty acres of land to a party named Linton in exchange for one thousand dollars and promissory notes on the remainder of the balance.\textsuperscript{29} Quimby next purchased these Linton notes and paid Hamilton on three of the six notes, which origi-
nated from Loan II.\textsuperscript{30} One of the Bachelder notes was also credited from this transaction.\textsuperscript{31} The result was that Hamilton still maintained a balance due of $1,640 to Dr. Bachelder.\textsuperscript{32} Hamilton conveyed a note to Dr. Bachelder that this amount would be payable in ninety days and additionally gave Dr. Bachelder a power of attorney to confess judgment and execute a deed of trust on seventy acres of land as security.\textsuperscript{33} Hamilton never paid the amount; and when Dr. Bachelder sold the securitized land, Hamilton brought a chancery action to enjoin the sale.\textsuperscript{34} Hamilton also alleged that his debt had been satisfied in full by his payments to Quimby, and further, that some $1,300 of the $1,600 obligation on the Bachelder note was for usurious interest.\textsuperscript{35}

At trial, the court found that Dr. Bachelder was a holder in due course of the note having paid consideration for it from Quimby.\textsuperscript{36} The court also found that no portion of the Bachelder obligation was usurious.\textsuperscript{37} Hamilton's action was therefore dismissed.\textsuperscript{38} The land was eventually sold and a deficiency judgment entered.\textsuperscript{39} The court of common pleas sitting in Cook County entered a judgment against Hamilton for court costs and fees.\textsuperscript{40} This judgment was levied against a parcel of land located in Lake County, Illinois (belonging to Hamilton) and later sold to Quimby at a sheriff's sale.\textsuperscript{41} When the redemption period had expired, Quimby sold the land to a third party and Hamilton filed a lawsuit to set aside the sale.\textsuperscript{42} It was this second action that implicated claim-splitting.

Hamilton alleged in this subsequent action that his conveyance of the Linton notes to Quimby satisfied nearly all of his debts, including those on the Bachelder notes.\textsuperscript{43} Most importantly, Hamilton alleged that Quimby was given a blank power of attorney and a deed in trust. Additionally, it was alleged that, without authority, Quimby filled in these blank forms with the $1,600 amount Hamilton claimed was incorrect, and that Quimby had committed fraud.\textsuperscript{44}

\textsuperscript{30} Id.
\textsuperscript{31} Hamilton, 46 Ill. at 92.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id. at 93.
\textsuperscript{41} Hamilton, 46 Ill. at 93.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
The court found that Hamilton’s allegations of fraud, even though they may have been supported by the evidence, were barred under the claim-splitting doctrine. Justice Wilker noted that Hamilton must have been aware of the alleged fraud when he filed his first action to enjoin Bachelder’s original sale. Therefore, Hamilton missed his chance to litigate an issue, which arose out of the original transaction, and which could have been brought in his original complaint. Justice Wilker stated that “[a] party cannot litigate and try a cause by parts, in different proceedings; he must bring his whole case before the court, and have it disposed of in one proceeding.”

Hamilton can be classified primarily as a substantive claim-splitting by omission case. The plaintiff’s cause of action contained issues A and B, yet only issue A was raised in the initial lawsuit. By bringing an action on issue B at a later time, the plaintiff needed to re-open previously adjudicated issues, which triggered res judicata. If Hamilton had alleged fraud by Quimby in his chancery action, he would not have had to file a second action to set aside the judicial sale arising from the disputed fee award. From Hamilton, we can observe that the anti-claim-splitting doctrine was on solid footing in Illinois in the middle of the nineteenth century.

The next widely cited case on substantive claim-splitting is the 1870 Illinois Supreme Court opinion in Rogers v. Higgins. In 1845, Ann Wright, a married woman, had entered into a contract with the plaintiff, Rogers, for the sale and conveyance of property located in the city of Chicago. The Wrights executed this agreement at the end of that year. About fifteen years later, after the death of Ann Wright’s husband, she conveyed the same property to Higgins by quitclaim deed.

In earlier litigation brought by the plaintiff, the court held that the original 1845 conveyance was void because Illinois law did not allow a married non-resident woman to execute a deed for the conveyance of real property. Rogers’ 1869 bill in equity, to enjoin the prosecution of ejectment and to set aside the quitclaim deed to Higgins, argued that the land at issue was of the separate estate of Wright and she therefore could “deal with it as a feme sole, and dispose of it without joining her husband . . . .” Additionally, Rogers claimed that she acquired an equitable interest in the property.

45. Id. at 94.
46. Hamilton, 46 Ill. at 94.
47. Id.
48. Rogers v. Higgins, 57 Ill. 244 (1870).
49. Id. at 246.
50. Id.
51. Id.
The court refused to entertain the second lawsuit under the rule that a litigant could not try a case piecemeal.\textsuperscript{52} Under the doctrine of res judicata, the second action was barred.\textsuperscript{53} Rogers is also an important case because we see, at an early date, that the Illinois Supreme Court utilized a transactional test for determining whether the causes of action in both lawsuits were identical. The court said:

\begin{quote}
[T]he cause of action in the former bill, and in the present . . . is the same, to wit, that the complainant was entitled to an equity in this property, arising out of the execution of the said contract and deed from Mrs. Wright to Rogers; and the present bill, so far as said contract and deed are concerned, is only insisting upon an additional ground in support of the same cause of action.\textsuperscript{54}
\end{quote}

The court continued:

When the complainant before presented his cause of action before the court, he should have brought forward and urged all the reasons which then existed, for the support of it. The controversy can not (sic) be reopened to hear an additional reason, which before existed, and was within the knowledge of the party, in support of the same cause of action.\textsuperscript{54}

\textit{Rogers} established that the cause of action arose out of the contract and deed. The addition of a new theory supporting recovery did not in itself create a new cause of action, which might require new forms of evidence.

The \textit{Rogers} court applied the precedent laid down in \textit{Hamilton} when it noted that Hamilton's new fraud theory might actually have been supported by evidence; but since it was within his knowledge at the time of the first lawsuit, it could not be raised after the first case was adjudicated. This principle of barring new litigation on new theories of recovery arising out of a single nucleus of fact or occurrence, and known to the plaintiff at the time of the first action, represents a cornerstone of Illinois claim-splitting jurisprudence.

Another commonly cited claim-splitting case is \textit{Ruegger v. Indianapolis & St. Louis Railroad Co.}\textsuperscript{55} The Indianapolis and St. Louis Railroad, (I & St. L), had brought an earlier action in federal court to enjoin the collection

\begin{flushleft}
\begin{itemize}
\item \textsuperscript{52} \textit{Id.} at 247.
\item \textsuperscript{53} \textit{Rogers}, 57 Ill. at 246-47.
\item \textsuperscript{54} \textit{Id.} at 247.
\item \textsuperscript{55} \textit{Ruegger v. Indianapolis & St. Louis R.R. Co.}, 103 Ill. 449 (1882).
\end{itemize}
\end{flushleft}
of stock taxes for the years of 1873, 1874, 1875 and 1876. The railroad had argued that its only connection with the State of Illinois was that it ran its trains on tracks belonging to the St. Louis, Alton and Terre Haute Railway Company (St. L, A & T), under a lease and could not be held liable for the payment of the tax. After a hearing, the federal court dismissed the bill and this decree was affirmed by the United States Supreme Court.56

The I & St. L next filed suit in state court alleging that the State of Illinois had no authority to levy the stock tax against it, because it was not an Illinois corporation, it did not own any capital stock or indebtedness within the State, and that the tax was fraudulent and void.57 In an amended complaint filed later, the I & St. L pled that the stock tax had been assessed against the St. L, A & T, which was an Illinois corporation, but that I & St. L operated its rolling stock on tracks situated in Illinois under a lease from the St. L, A & T.58

The Illinois Supreme Court held that res judicata and the rule against claim-splitting applied to the I & St. L's claims. The court noted that both the federal and instant lawsuits sought the same identical outcome: the enjoining of the collection of the stock tax for the years 1873 to 1876. The only difference was that in the federal lawsuit the I & St. L directly challenged the validity and collection of the stock tax whereas in the Illinois lawsuit, the Railroad was challenging the levy of the tax against the lessor railway, the St. L, A & T.59 The court, having already cited to Hamilton and Rogers, said,

[A] reason is urged to defeat the tax in this case which was not urged in the other case, but that can not (sic) affect the question . . . . [T]he complainant was bound to bring forward every objection that existed to the validity of the tax, and if he failed to do so he can not, in a subsequent suit, urge an objection which he might have insisted upon in the former action.60

Ruegger is a classic substantive claim-splitting case where the same theory of relief was sought in each lawsuit (the injunction), but after the plaintiff lost its first action, a second lawsuit with a new theory for the same type of relief was brought in a court of competent jurisdiction.

The court in Ruegger, as in previous cases, applied a transactional test for evaluating whether the I & St. L was attempting to split its cause of ac-

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56. Id. at 454-55.
57. Id. at 451-52.
58. Id. at 452.
59. Id. at 457-58.
60. Ruegger, 103 Ill. at 458.
tion. Both lawsuits arose out of the disputed assessment of the same stock tax for the same calendar years. Any theories for relief argued by the plaintiff naturally arose out of that common nucleus of fact. It was therefore incumbent upon the plaintiff to bring all of its claims or theories in that first action. Ruegger further exemplifies how new theories for relief flow from a single cause of action. The cause of action in Ruegger was alleged impropriety of the assessment of the tax. Each theory does not, however, create separate and distinct causes of action in and of itself.

In Bailey v. Bailey, the foundation of the minor plaintiff’s case was a claim to title in land located in McLean County, Illinois. There had been an earlier decree entered against the minor preventing him from acquiring title in the subject property. The minor plaintiff, William Bailey, Jr., sought a partition of the property. Judge Reeves, writing for the Illinois Supreme Court, and relying upon Higgins, held that Bailey Jr. was estopped by the earlier decree:

The complainant in the first suit was represented by a guardian and an attorney, who knew, or ought to have known, what rights and title the complainant had in the property, and it was their duty to present that title, and if they failed, it was through their own neglect which can not be used to the complainants’ advantage on a second suit.

Bailey is another example of substantive claim-splitting. While the reported case fails to provide details of the initial lawsuit and decree entered against William Bailey, Jr., it appears that he had failed to raise substantive issues that may or may not have supported his request for relief, such as title in the subject property. From these early cases, it can be observed that the traditional bar against claim-splitting was uniformly applied as the nineteenth century came to a close.

In the next century, the rule against claim-splitting was at the center of In re Assessment of Northwestern University. Cook County, Illinois had assessed property taxes on land that was owned by the University and, in turn, leased to the Illinois Trust Safety Deposit Company, which operated a bank on the subject premises. The University objected to the assessment based upon the Illinois Legislature’s Act of 1855 that immunized the University from being taxed in any capacity. The City argued that the 1855

62. Id. at 397.
63. In re Assessment of Prop. of Nw. Univ., 69 N.E. 75 (1903).
64. Id.
65. Id. at 76 (quoting § 4 of An Act to Incorporate the Northwestern University, approved Feb. 14, 1855: “That all property of whatever kind or description belonging to or
Act violated the Illinois Constitution and, secondly, that the land at issue was acquired by the University prior to the 1855 Act.66

In an earlier lawsuit, the Illinois Supreme Court ruled that the 1855 Act complied with the state's constitution.67 The result was that Northwestern University did not have to pay taxes on its property, and this was affirmed by the United States Supreme Court.68 The effect of this earlier case effectively defeated the County's duplicate theory.69

The Illinois Supreme Court also held that the County could have raised its additional theories in the earlier litigated action.70 At the time of the first action, the County was fully aware of the facts surrounding the University's purchase of the property at issue. These same facts formed the core of its new theory of recovery. The Supreme Court held that the case at bar was defeated by res judicata, because "[t]he principle of res judicata . . . extends not only to the questions of fact and of law which were decided in the former suit, but also to the grounds of recovery or defense which might have been but were not presented."71 By failing to include the second theory of recovery in its initial lawsuit, the County was estopped from ever raising it. In re Northwestern University demonstrates clearly how the public policy behind the rule against claim-splitting acts to fend off duplicative and seemingly endless litigation. If not for the claim-splitting bar, the University might have been faced with un-ending litigation by the Cook County Assessor.

In 1931, the Illinois appellate court applied the rule against claim-splitting in Schmidt v. Modern American Woodmen of America.72 In Schmidt, insured members of the defendant society brought a lawsuit seeking to enjoin the enforcement of a by-law, which had been previously adopted at a 1929 meeting of the society's Head Camp. The amended by-law resulted in an increase of the plaintiffs' insurance rates. They alleged in their complaint that the new by-law was void and illegal, as well as the method by which the Head Camp acted prior to the time of the by-law's adoption.73

Prior to this lawsuit and upon the adoption of the amended by-law, a class action, Jenkins v. Talbot, had been filed in the Circuit Court of Cook

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66. Id. at 76.
67. Id.
69. See Northwestern, 69 N.E. at 76.
70. Id.
71. Id. (emphasis added).
73. Id. at 277.
County alleging that the method by which the amended by-law was adopted was illegal and therefore the by-law itself was illegal.74 Other insured society members had also intervened in the earlier Jenkins case.75 The main allegations were essentially the same between the two lawsuits. After a hearing, this earlier lawsuit was dismissed for want of equity, and a decree was entered that the by-law was “duly, regularly and legally adopted and that the same [was] valid, legal and binding” upon the parties.76 This decree was affirmed by the Illinois Supreme Court.77

The second complaint asked for the same form of relief but attempted to assert new substantive theories in support. The Schmidt court noted that the cause of action in both cases was the alleged invalidity of the amended by-law.78 The Schmidt plaintiff could not create a “new or different cause of action by averring that the by-law [was] invalid or void for other known reasons which could have been but were not presented to the court in the Jenkins case.”79

Once again, the court utilized a transactional approach to its analysis. New theories of recovery did not create new causes of action in Schmidt.80 Any theories of recovery flowing out of the alleged unlawful conduct by the society in Schmidt could have and should have been raised in the earlier litigated action. The conduct by the Head Camp and the resulting amended by-law comprised the nucleus of fact from which any alleged wrongs flowed forth.81

74. Id. at 277-78 (referencing the earlier filed case of Jenkins et al. v. Talbot et al.).
75. Id. at 277.
76. Id. at 278.
77. Schmidt, 261 Ill. App at 278. See also Jenkins v. Talbot, 170 N.E. 735 (Ill. 1930).
78. Schmidt, 261 Ill. App at 279.
79. Id.
80. Id.
81. Schmidt also applies earlier claim-splitting case law concerning class action lawsuits. Under the rule, if an earlier class files an action—which is then adjudicated—successive lawsuits by new members of a class on the same cause of action, but with new theories of recovery, will also be barred by res judicata and the rule against claim-splitting. The earlier adjudicated class action binds the entire class. In Harmon v. Auditor of Pub. Accounts, 13 N.E. 161 (Ill. 1887), the Illinois Supreme Court held that an earlier class action by taxpayers of Mt. Morris, Illinois to enjoin the Ogle County treasurer, (Pinkney) from issuing $75,000 in bonds to the Chicago and Iowa Railroad Company barred successive lawsuits over payouts on the bonds, which had been found valid. The purpose of the Harmon lawsuit had been to enjoin the Ogle County treasurer from paying out on these bonds. The Harmon appellate court stated, “[a] tax-payer who brings this kind of a suit, represents all other tax-payers, and that a judgment against them binds all others in the same common interest.” Harmon v. Auditor of Pub. Accounts, 22 Ill. App. 129, 137 (2d Dist. 1886), aff’d, 13 N.E. 161 (Ill. 1887). As such, the “complainants in the first suit not only represented themselves in the matter, but all the other tax-payers that then resided in the town and all whose who may come after them.” Id. Applying the claim-splitting bar against the later
The non-payment of pension benefits was the transaction at issue in People v. Board of Trustees of Police Pension Fund. In this mandamus action, the petitioner, Grace Nicholson, alleged that her deceased husband had been a member of the Hinsdale, Illinois police force by virtue of his status as a street commissioner and that she was entitled to certain pension benefits, which accrued at the time of her husband’s death. The pension board responded with a res judicata defense.

Several years prior to this action, Grace Nicholson had filed a mandamus action against the pension board with the same allegations that she was entitled to her deceased husband’s pension benefits. After a hearing on the petition, the court ruled that she was not entitled to the pension because the Police Pension Act did not apply to her request. The population of Hinsdale was under five thousand inhabitants, which did not meet the requirements of the Act in 1926, the year her husband passed away.

In the second mandamus action, the Second Appellate District held that Nicholson’s two mandamus actions were essentially identical. Both sought the same type of equitable relief in order to receive the same subject matter, being the pension benefits. The parties in each lawsuit were also the same. The court held fast to the rules set forth in Higgins and Schmidt that a party must bring forth all theories of recovery known to them at the time the first action is filed. The court found that all of the facts were known to Nicholson when she filed her first lawsuit. Therefore, she could not re-open the litigation based on any new factual grounds that arose out of the non-payment of the pension benefits.

Nicholson, again, is a very simple substantive claim-splitting case. The identity of the subject matter serves as the basis of the lawsuit from which all theories arise. The court in Nicholson employed a transactional type of test for determining the identity of a cause of action for res judicata. The group of taxpayers, the court stated that all the facts concerning the issuance of the bonds had been before the court, and attorneys in the first lawsuit and that the plaintiff class had remained silent on certain theories of relief. Id. at 138. Res judicata applied to the next class of taxpayers because their cause of action was essentially the same common nucleus of fact as the earlier action. Harmon and Schmidt demonstrate the importance of raising all possible theories in class action litigation because the rule against claim-splitting can be universally applied.

83. Id. at 1-2.
84. Id. at 3.
85. Id.
86. Id. at 4.
88. Id. at 3.
89. Id. at 4.
remedy sought did not change between the two lawsuits, only how the petitioner sought to collect it.

In Ernest Freeman & Co. v. Robert G. Regan Co.,\textsuperscript{90} Freeman sued to collect the unpaid remainder of a fee for which the parties contracted. The trial court ruled in favor of Freeman and awarded damages, but it ruled for Regan over a dispute concerning its true business identity.\textsuperscript{91} Freeman brought a subsequent action against the same (judicially corrected) defendant alleging that it failed to honor the terms of a written agreement that had been introduced into evidence at the earlier bench trial.\textsuperscript{92} The appellate court stated, "A mere change in the theory of what is essentially a single cause of action may not be sufficient to prevent the application of the doctrine of res judicata, especially where the questions raised in the second action might have been litigated in the first suit."\textsuperscript{93} The court found that the "[p]laintiff's demand [was] in its nature entire and indivisible and [could not] be split into several causes of action."\textsuperscript{94} Freeman is an example of substantive claim-splitting where the same relief is sought based on different theories which were raised in separate sequential lawsuits.

In Pratt v. Baker,\textsuperscript{95} the plaintiff brought an action against the executor of an estate for failing to execute their duties relating to the estate’s administration. The plaintiff’s complaint set forth three counts: the first was based upon the executor’s bond; the second was based in tort; and the third being a fraud theory.\textsuperscript{96} It is important to note that the court said that all three theories arose out of the alleged breach of the executor’s duties.\textsuperscript{97} Pratt was the third lawsuit filed in a string of actions brought by the plaintiff against the executor. In this third action, the executor asserted a res judicata claim-splitting defense founded on the dismissal of the plaintiff’s earlier filed second lawsuit.\textsuperscript{98}

In the earlier lawsuit, the plaintiff had essentially filed a nearly identical complaint but did not include the tort and fraud counts.\textsuperscript{99} The trial court had granted the defendant’s motion to dismiss the second lawsuit as a matter of law and not for any technical defects in the complaint that might

\textsuperscript{91} Id. at 516.
\textsuperscript{92} Id. at 516-17.
\textsuperscript{93} Id. at 517.
\textsuperscript{94} Id. at 518.
\textsuperscript{96} Id. at 866.
\textsuperscript{97} Id. ("All of the counts were based upon the breach of the same alleged duties which were made the basis of the second suit. . . .").
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 867.
have been corrected by amendment.100 Because of this, the dismissal of the second lawsuit was on the merits.101

The third lawsuit was nearly a clone of the second. It sought the same relief against the executor but added new theories. It did not matter that the plaintiff pled new theories.102 The earlier action had been adjudicated based on the alleged breach of duty and the court had found that no such legal basis for recovery existed. The court concluded, "The law affords every man his day in court along with the opportunity to present his case on the issues involved; and it requires that he bring forth all grounds of recovery or defense that he may then have."103 The court in Pratt clearly defined the cause of action as the alleged breach of duties by the executor. As in the earlier cases, the theories of recovery arose out of this nucleus of fact. Therefore the Pratt plaintiff could not seek recovery in successive lawsuits.

In Prochotsky v. Union Central Life Insurance Co.,104 a substantive and remedial claim-splitting case, the plaintiff filed a chancery action seeking injunctive relief, an accounting and the imposition of a constructive trust.105 The plaintiff had brought an earlier action against the same defendant for both breach of contract and breach of industry customs for unpaid commissions and summary judgment was granted for the defendant.106 The plaintiff argued that his chancery action was based on breach of an oral agreement, a theory different than his first lawsuit.107 The appellate court affirmed the dismissal of the chancery action based on res judicata and stated that the "[p]laintiff could have presented both theories in his first action."108 The Prochotsky plaintiff tried to get a second bite at the apple.109 The case also supports the position later incorporated into the Restatement (Second) of Judgments that upon entry of judgment for a plaintiff, "the claim is ordinarily exhausted so that [they are] precluded from seeking any other remedies deriving from the same grouping of facts."110

100. Pratt, 223 N.E.2d at 867.
101. Id.
102. Id. at 868.
103. Id.
105. Id. at 389.
106. Id. at 390.
107. Id.
108. Id.
109. See Prochotsky, 276 N.E.2d at 390. ("The law requires that both in law and in equity a plaintiff must present all grounds of recovery he may have. He cannot preserve the right to bring a second action after loss of the first merely by limiting the theories of recovery opened by the pleadings in the first action.").
110. Restatement (Second) of Judgments § 25, cmt. f (1982).
Another case applying a transactional test to claim-splitting is *Shoemaker v. Geiger.*\textsuperscript{111} In *Shoemaker,* the plaintiff brought an action seeking $275.46 in damages because the cow he had purchased from the defendant was not with calf as originally represented.\textsuperscript{112} Judgment was then entered in favor of the defendant based on insufficient evidence.\textsuperscript{113}

After judgment was entered, the plaintiff brought a second lawsuit seeking $1,200.00 in alleged overpayment of the cattle, which were claimed to be pregnant.\textsuperscript{114} The defendant this time successfully asserted res judicata as a reason why the second lawsuit should have been dismissed.\textsuperscript{115} Appeals were taken in both cases and consolidated.

Justice Barry writing for the court applied the transactional test for causes of action and found that the second lawsuit was barred because “both causes of action between the same parties [were] merely different claims for damage arising from a single transaction. Both the alleged ‘guarantee’ and the ‘overpayment’ relate to the enforcement of the terms of an agreement between the parties . . . .”\textsuperscript{116} Further:

A party cannot litigate a cause by parts in different proceedings; a prior adjudication between the same parties is conclusive not only as to matters raised but as to every other element of damage arising from the same transaction of which they had knowledge and ought to have set up as grounds for relief.\textsuperscript{117}

In essence, the plaintiff in *Shoemaker* was simply trying to raise new theories for recovery of different damage amounts in a piecemeal fashion after suffering defeat in his original action. *Shoemaker* is an example of both occurrences of substantive claim-splitting. The plaintiff’s theories differed between his two lawsuits as did the amount of his ad damnum.

*Sjostrom v. McMurray*\textsuperscript{118} represents an example of substantive and remedial claim-splitting. In *Sjostrom,* the plaintiff had initially filed an action for money damages in the Circuit Court of Kane County but had brought the action under a corporate name, Joyce Builders, which was a misnomer.\textsuperscript{119} The case had been dismissed with prejudice as a discovery

\textsuperscript{112} Id. at 638.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Shoemaker, 331 N.E.2d at 638.
\textsuperscript{117} Id. (citing Menconi v. Davison, 225 N.E.2d 139 (Ill. App. Ct. 1967)).
\textsuperscript{119} Id. at 746.
sanction pursuant to Illinois Supreme Court Rule 219. The appellate court affirmed the lower court’s finding that res judicata applied to bar the mechanic’s lien claim and further that the plaintiffs were engaged in claim-splitting. Justice Seidenfeld concluded that “[t]he fact that the second suit sought an increased recovery and the establishment and foreclosure of a mechanic’s lien does not alter the fact that there is a single cause of action based upon the alleged breach of the building contract. The Sjostrom plaintiff was attempting to raise new substantive issues and new forms of relief with its mechanic’s lien claim after the failure of its earlier action for damages. In this manner, the Sjostrom plaintiff tried to substantively “split” his claims.

Finally, in Radosta v. Chrysler Corp., a remedial claim-splitting case, the defendant was sued in an automobile accident case. He filed a counterclaim against his automobile’s dealer and manufacturer for strict liability and negligence alleging that the steering mechanism of his vehicle was defective. However, he failed to file a claim for indemnification against the same codefendants. After judgment was entered against him in the accident case, he filed an indemnification claim against the manufacturer and dealer of his automobile.

The appellate court ruled that Radosta’s indemnification action was barred by res judicata because the indemnification claim could have been pled in the earlier underlying accident case. Justice Romiti determined that the alleged defective steering and resulting accident comprised the core factual nucleus of the cause of action. To have allowed the indemnification claim to proceed would have resulted in duplicative litigation and claim-splitting.

120. Id. at 746 n.1 (referencing ILL SUP. CT. R. 219).
121. Id. at 746.
122. Id. at 748.
123. See Sjostrom, 362 N.E.2d at 745.
125. Id. at 671.
126. Id.
127. Id.
128. Id. at 672.
129. See Radosta, 443 N.E.2d at 673 (“It is immaterial that Radosta seeks different damages here since the assertion of different kinds of relief or different damages still constitute a single cause of action if a single group of operative facts give rise to the assertion of relief and Radosta could have joined the second claim in the first action.” (citations omitted)).
130. See id.
The cases heretofore summarized do not comprise an exhaustive list of all claim-splitting cases reported in Illinois over the past century and a half. What this section seeks to highlight is how the claim-splitting bar under res judicata was consistently applied in different types of actions over a large span of time. It also demonstrates that from an early period Illinois focused on the factual core of a cause of action when dealing with claim-splitting problems.\textsuperscript{131} To summarize a general rule, congruent with the Restatement (Second) of Judgments, a plaintiff must raise all issues and demands for relief known at the time of the original action in their original lawsuit, which arise from the same transaction. The transaction is a nucleus of fact that gives rise to a right to legal recovery. Failure to raise an issue or demand for relief results in claim-splitting, and will generally be barred under res judicata. In the following sections, it will be shown that the courts have diverged more and more from traditional res judicata claim-splitting.

B. THE ENGLISH RULE APPLIED TO ILLINOIS TORT CASES

In the late 1920's claim-splitting jurisprudence in Illinois branched off in a new direction. In \textit{Clancey v. McBride},\textsuperscript{132} the Illinois Supreme Court was faced with the issue of whether a tortious act, which caused both personal injury and damage to property, constituted a single cause of action for claim-splitting purposes.\textsuperscript{133} The \textit{Clancey} plaintiff brought an action for motor vehicle damage caused by the defendant's negligent operation of his own vehicle. A justice of the peace heard the case on the merits, and rendered a verdict in her favor for $275.00, which was paid by the defendant.\textsuperscript{134} The plaintiff then filed an action against the same defendant for personal injuries she suffered in the same accident.\textsuperscript{135} The defendant asserted that res judicata barred the personal injury lawsuit but the trial court ruled against him on the issue.\textsuperscript{136} The jury awarded the \textit{Clancey} plaintiff another $2,000.00 for her personal

\textsuperscript{131} Illinois courts would deviate from the transactional test and adopt a "same evidence" test for determining if the causes of action in a res judicata situation were identical. See, e.g., Schmitt v. Woods, 392 N.E.2d 55, 56 (Ill. App. Ct. 1979); Kahler v. Don E. Williams Co., 375 N.E.2d 1034, 1036 (Ill. App. Ct.1978). The Illinois Supreme Court eliminated the "same evidence" test and re-implemented the transactional test in \textit{River Park, Inc. v. City of Highland Park}, 703 N.E.2d 883, 392 (Ill. 1998). The court in \textit{River Park} did note that in earlier res judicata cases, both the "same evidence" test and the transactional test would have been satisfied, and that this may have led to confusing and contradictory case law. \textit{Id. at} 308-09, 703 N.E.2d at 891-92.

\textsuperscript{132} 169 N.E. 729 (Ill. 1929).

\textsuperscript{133} \textit{Id. at} 729.

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.}
injuries that was later reduced by remittitur.\textsuperscript{137} The appellate court reversed finding that the motor vehicle collision was a single cause of action and that the earlier property damage action was a bar to later recovery.\textsuperscript{138}

The Illinois Supreme Court's opinion was devoid of any earlier Illinois claim-splitting citations. Instead, the court studied rulings from other jurisdictions. Justice DeYoung, (as had Justice O'Connor in the appellate court), identified multiple cases from other states where it had been held that a single tortuous act constituted a single cause of action.\textsuperscript{139} On the opposite end of the spectrum was the "English rule" laid down in \textit{Brunsden v. Humphrey},\textsuperscript{140} a Queen's Bench case. Under the English rule, a splitting of

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\textsuperscript{137} \textit{Clancey v. McBride}, 169 N.E. 729, 729 (Ill. 1929).
\textsuperscript{138} \textit{Id. See also Clancey v. McBride}, 251 Ill. App. 157 (1929).
\textsuperscript{140} \textit{See Clancey}, 169 N.E. at 730 (citing Brunsden v. Humphrey, [1884] L.R. 14 Q.B. 141). The facts in \textit{Brunsden} are essentially identical to those in \textit{Clancey}. \textit{See Brunsden}, L.R. 14 Q.B. 141. Master of the Rolls, Brett, in his opinion, stated, "the owner of property has a right to have it kept free from damage. The plaintiff has presented the action on the ground that he has been injured in his person. He has the right to be unmolested in all his bodily powers." \textit{Id.} at 145. Essentially there were two separate and distinct bodies of harm. Brett noted the defendant's reliance on the legal maxim: \textit{interest republicae ut sit finis litium}, meaning, that it is in the interest of the state for there to be minimal litigation. However, Brett also noted that applying the maxim to the facts in \textit{Brunsden} would lead to an unjust result. \textit{Id.} The opinion also asked the question as to whether a plaintiff who sues for property damage should be barred from a later personal injury lawsuit where the injury develops at a later date. \textit{Id.}

Lord Justice Bowen also noted the aforementioned legal maxim, and that the court had to figure out "how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of a previous suit." \textit{Id.} at 148. \textit{See also Ferrer's Case}, [1912] Eng. Rep. 6 Coke, 9a. The Lord Justice expressed favor for a same-evidence test. \textit{See Brunsden}, L.R. 14 Q.B. at 147-48. (citing Kitchen v. Campbell, 2 W. Bl. 827; Thorpe v. Cooper, 5 Bing. 129). The Lord Justice concluded that the there were two separate and distinct injuries that arose out of the accident and that to apply the aforesaid legal maxim rigidly promoted technical forms over substance. \textit{Id.} at 148 ("[I]t is evident therefore that the application of the rule depends, not upon any technical consideration of the identity of forms of action, but upon matter of substance."). To have rigidly barred the later injury suit would have promoted an "abuse of substantial justice." \textit{Id.} at 150.

Chief Justice Lord Coleridge authored a very brief dissent in \textit{Brunsden} simply arguing "that the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect to different rights, i.e. his person and his goods . . . ." \textit{Id.} at 152-53. The Lord Chief Justice continued by noting the absurdity and oppres-
claims is allowed because the type of damage incurred by a plaintiff, (i.e.,
negligent act causing property damage and personal injury), is demonstra-
ted by separate and distinct bodies of evidence. The Clancey court noted that
there were substantial differences between injury to one’s person and injury
to one’s property. Among these differences were the assignability of a
property damage claim, (e.g., subrogation), versus the non-assignability
of a bodily injury; the differing statute of limitations between personal
injury and property damage lawsuits; and, issues of title regarding the
property involved. It was felt that these differences were substantial
enough to conclude that the personal injury and property damage claims
were separate causes of action. The decision of the appellate court was
reversed and the trial court’s judgment in favor of the plaintiff was re-
instated.

Clancey was a major break from Illinois law. The appellate and su-
preme courts had arrived at opposing holdings based on the same facts
and the same bodies of case law from other jurisdictions. It was only a question
of which side to choose. After Clancey, the law no longer appeared to de-
fine a cause of action for res judicata purposes as the factual events, which
gave rise to a claim for relief. Under Clancey, a plaintiff could assert any
number of ongoing claims for multiple distinct damages whether to one’s
person or to property. The Clancey line of reasoning appeared to favor mul-
tiplicity of litigation. It also ran counter to earlier claim-splitting case law
requiring a plaintiff to bring forward all of their claims, which are known
upon the filing of their lawsuit. Criticism of the Clancey decision came

siveness of hypothetically allowing a plaintiff to file numerous lawsuits for each injury in-
curred by different parts of his body. Id. at 153. This might suggest that the Lord Chief Justi-
cence would not have favored defining a cause of action by the plaintiff’s rights that were
violated by a defendant’s tortious conduct, but by the totality of the conduct itself.). See id.
141. See Clancey, 169 N.E. at 730.
142. Id. at 730-31.
143. Id. at 730.
144. Id. (noting that the statute of limitations for personal injury is two years and for
property damage is five years).
145. Id.
N.E. 772, 773) (“If, while injury to the horse and vehicle of a person gives rise to but a sin-
gle cause of action, injury to the vehicle and its owner gives rise to two causes of action, it
must be because there is an essential difference between an injury to the person and an injury
to property, that makes it impracticable, or at least very inconvenient, in the administra-
tion of justice, to blend the two.”).
147. Id. at 731.
148. Clancey, 251 Ill. App. at 165 (“[The appellate ruling against applying the Eng-
lish rule] will avoid unnecessary litigation because damages for injury to the property and
person may, properly, be joined in one action.”).
swiftly. A Comment in the 1930 Illinois Law Review expressed concern that the supreme court had undermined the well-honed legal maxim set forth in the early case of *Fetter v. Beal* that represented the public policy of minimizing litigation and preventing harassment of a defendant. The Comment raised the concern that the supreme court had opened the door to a stream of endless litigation because, in theory, in every first filed vehicular collision case, an award for property damage would require the court to determine the issue of negligence. As a result, a defendant would be unable to challenge proof of negligence in a later filed action for personal injury, which would presumably seek a monetary amount greater than that of the property damage case.

The Comment’s author also criticized the English rule on grounds that when carried to its extreme, a plaintiff who suffers injury to different parts of his body could file separate lawsuits for each body part. Secondly, the English rule would only apply to negligently caused torts but not for intentional torts, which the author considered “irrational and undesirable.” Lastly, the author noted that if a cause of action was based on the “number of rights invaded[,]” the result might be numerous lawsuits filed by a plaintiff for multiple injuries arising from a single course of conduct. The gravamen was that the English rule favored a multiplicity of lawsuits, resulted in the harassment of defendants, and ultimately interfered with an efficient administration of justice. It was recommended by the Comment’s author that *Clancey* be overruled.

How, then, can *Clancey* be explained? Why would the courts fail to consider how the rule against claim-splitting had been applied previously in Illinois? It was clear from both the appellate and supreme court that the issue at bar, property damage and personal injury, was treated as one of first impression. Earlier Illinois cases dealt with contract or property related issues where new theories or new forms of relief were sought in a subse-

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151. By the time *Clancey* was decided, it was established by earlier case law, as the Comment’s author pointed out, that Illinois followed this doctrine. See L. C. D., Comment, *supra* note 149, at 220.
152. See L. C. D., Comment, *supra* note 149, at 222.
153. *Id.*
154. *Id.* at 221.
155. *Id.*
156. *Id.*
quent action. These cases measured the plaintiff’s cause of action from a transactional perspective. In those situations, a transactional test made sense because the evidence might very well have supported theories in both the initial and subsequent lawsuits. Therefore, a same-evidence test, which was employed in *Clancey*, would have been redundant as the forms of damages were not separate and distinct in character. As a result, the courts were never forced to consider a situation where separate and distinct injuries of different natures arose. Not having precedential tort-based or mixed tort/property-based claim-splitting cases to scrutinize left the *Clancey* court having to choose between the American and the English rule.

*Clancey* continued to be invoked alongside traditional claim-splitting rulings. In *Stephan v. Yellow Cab Co.*,\(^159\) the First District Appellate Court was faced with a near identical fact pattern as in *Clancey*. The *Stephan* plaintiff had suffered both property damage and personal injuries arising out of a motor vehicle accident caused by the cab company driver’s negligent conduct.\(^160\) The plaintiff’s insurance company had paid its insured’s repair costs of $2,300 and subsequently filed a subrogation action against Yellow Cab.\(^161\) Prior to the filing of the subrogation action, Stephan had filed a personal injury lawsuit against the cab driver.\(^162\) The personal injury action had been dismissed as a consequence of Stephan’s failure to abide by the trial court’s discovery orders.\(^163\) This dismissal was considered to be on the merits under Illinois Supreme Court Rule 273.\(^164\) When the subrogation action was called for trial, Yellow Cab moved for a dismissal based upon the res judicata effect of the earlier dismissed injury lawsuit.\(^165\) The trial court granted the dismissal.\(^166\)

On appeal, the First District wasted no time applying *Clancey*. The court began by stating the general rule that res judicata applies if the same cause of action is employed in both lawsuits.\(^167\) However, under *Clancey*, personal injury and property damage claims arising from a motor vehicle negligence action were separate and distinct causes of action because they

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160. *Id.* at 224.
161. *Id.*
162. *Id.*
163. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* ("Generally, a former judgment is not a bar to a subsequent action between the same parties if the subject matter involved in the two actions is not identical. Identity of the subject matter is not alone a sufficient test; the true requirement is that the causes of action be the same.").
were autonomous bodies of damage. Relying upon *Clancey, Brunsden*, and the English rule, the trial court’s dismissal of the subrogation action was reversed and remanded. Of great note was *Stephan’s* reliance on *Clancey*’s concern that rigidly applying the claim-splitting bar in motor vehicle cases could allow an insured to foreclose their insurance company’s right of subrogation. The public policy concerns about protecting a subrogor’s rights expressed in *Clancey* became fully realized in *Stephan*.

*Clancey* and the English rule remained relatively undisturbed for almost sixty years. Yet, the winds were beginning to turn against this multiple recovery doctrine. For example, there were signals in Justice Romiti’s *Radosta* opinion that the foundation of the English rule in Illinois was beginning to crumble. *Radosta*, as discussed earlier was a traditional claim-splitting case involving a situation where a plaintiff had failed in his original lawsuit to raise claims for relief. In addressing *Radosta*’s procedural disposition, the appellate panel stated that

> an entire claim arising from a single tort cannot be divided and be the subject of several actions regardless of whether or not the party suing has recovered all he might have recovered... [T]here cannot be successive actions brought for a single tort as damages in the future are suffered but the one action must embrace prospective as well as accrued damages.

Had *Radosta* been a part of Illinois’ res judicata law pre-1929, it is all together possible that *Clancey* and *Stephan* would have been decided differently. Further blows to the English rule in Illinois were to come.

*Mason v. Parker* represented the implicit obituary for the English Rule. Unlike *Stephan*, which implicated subrogation interests and expressed concern that a subrogor’s right to recovery could be prematurely extinguished, *Mason* was a pure clone of *Clancey*. In *Mason*, following a motor vehicle accident, the plaintiff filed a lawsuit for property damage in the Circuit Court of St. Clair County, Illinois. A judgment in favor of the

169. *Stephan*, 333 N.E.2d at 225 (quoting *Clancey v. McBride*, 169 N.E. 729, 731 (Ill. 1929) (“The differences in the rules governing assignability and subrogation, in the methods of enforcement, in the evidence required to sustain, in the distribution of the proceeds, and in the periods of limitation, above stated, militate against the doctrine that out of a single wrongful act only one cause of action to redress injury to the person and damage to property can arise.”)).
172. *id.* at 71.
plaintiff on this claim was entered.\textsuperscript{173} The plaintiff next filed a lawsuit seeking damages against the same defendant for personal injuries sustained in the incident.\textsuperscript{174} The defendant sought to dismiss the personal injury lawsuit on res judicata grounds.\textsuperscript{175} Relying on \textit{Clancey}, the trial court denied this request but granted interlocutory appeal on the issue.\textsuperscript{176}

The \textit{Mason} court had uncovered a fissure in Illinois res judicata jurisprudence centered around the decision in \textit{Rein v. David A. Noyes & Co.}\textsuperscript{177} In \textit{Rein}, the Illinois Supreme Court unequivocally stated, "[a] cause of action is defined by the facts which give a plaintiff a right to relief" and that "[w]hile one group of facts may give rise to a number of theories of recovery, there remains only a single cause of action."\textsuperscript{178} This statement conforms to traditional claim-splitting doctrine. Unlike the \textit{Clancey} court, Justice Maag focused on the factual core of case’s events:

An entire claim arising from a single tort cannot be divided and be the subject of several actions regardless of whether or not the party suing has recovered all he might have recovered. This is true even as to prospective damages, as . . . there cannot be successive actions brought for a single tort as damages in the future are suffered[,] but one action must embrace prospective as well as accrued damages . . . .\textsuperscript{179}

The \textit{Mason} court was faced with two contradictory rules of law from the Illinois Supreme Court. Under the English rule, a property damage claim and a personal injury claim were separate causes of action, regardless of whether they flowed out of the defendant’s negligent operation of his motor vehicle. Yet, the \textit{Rein} court looked to the factual occurrence to define the cause of action (for purposes of res judicata). The \textit{Mason} court relied upon the later holding in \textit{Rein} and concluded that \textit{Clancey} had effectively been overruled.\textsuperscript{180} Justice Maag also expressed concern that were \textit{Clancey} to be followed under these facts, it might create an atmosphere of endless litigation.\textsuperscript{181}

\begin{footnotesize}
\item 173. \textit{Id.}
\item 174. \textit{Id.}
\item 175. \textit{Id.}
\item 176. \textit{Mason}, 695 N.E.2d at 71.
\item 178. \textit{Id.} at 1206 (quoting People ex rel. Burris v. Progressive Land Developers, Inc., 602 N.E.2d 820 (Ill. 1992)).
\item 179. \textit{Mason}, 695 N.E.2d at 72 (quoting Radosta v. Chrysler Corp., 443 N.E.2d 670, 672 (Ill. App. Ct. 1982) (citations omitted)).
\item 180. \textit{Id.}
\item 181. \textit{Id.} (citing Radosta, 443 N.E.2d at 672 ("To recognize the holding in \textit{Clancey} would be to allow claim-splitting, leaving the courtroom doors open to a possibility of nev-
Justice Chapman filed a dissent in *Mason* arguing that *Clancey* was in fact still viable law because the Illinois Supreme Court had failed to make a definitive statement as to its application. Justice Chapman filed a dissent in *Mason* arguing that *Clancey* was in fact still viable law because the Illinois Supreme Court had failed to make a definitive statement as to its application. The dissent raised the distinction that *Rein* dealt with piecemeal appellate abuse brought about by invocation of voluntary dismissals and not the cause of action identity issue at bar. After discussing *Clancey*'s reliance on *Brunsden*, he concluded that the implication that *Rein* overruled *Clancey* was erroneous because other cases had relied upon the English rule. Justice Chapman thought that only the supreme court could decide the issue in question and until such a time, would have affirmed the trial court's decision.

The Illinois Supreme Court did not weigh in on *Mason* as Justice Chapman had hoped. Instead, *Rein* appeared to have done away with the English rule of *Clancey* without actually saying so. *Clancey* should no longer be considered effective law and Illinois' English rule is virtually extinct. Fragments of *Clancey* do persist today in the form of the statutory subrogation exception to the rule against claim-splitting.

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er-ending legal battles between the same parties based upon the same set of facts. Litigation should have an end. No person should be harassed with a multiplicity of lawsuits arising out of one cause of action.

182. *Id.* (Chapman, J., dissenting).
183. *Id.*
185. *Id.* at 73 (noting the reliance on *Clancey*'s holding in *Stephan v. Yellow Cab Co.*, 30 N.E.2d 223 (Ill. App. Ct. 1975)).
186. *Id.*
187. *See Rein v. David A. Noyes & Co.*, 665 N.E.2d 1199 (Ill. 1996). The English rule conflicts with the Illinois Supreme Court's holding in *River Park, Inc. v. City of Highland Park*, wherein the court wholly rejected the "same evidence" test as the measure for identifying a cause of action:

[O]ur approval of the transactional test necessitates a rejection of the same evidence test. Accordingly, we hold that the same evidence test is not determinative of identity of cause of action. Instead, pursuant to the transactional analysis, separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief.

*Id.* at 893. It is also interesting to consider that under the section 26(1)(c) exception to claim-splitting set forth in the Restatement (Second) of Judgments as adopted in *Rein*, *Clancey*'s appellate ruling would have been affirmed. *See Rein*, 665 N.E.2d at 1207. The supreme court noted that the plaintiff's property damage claim was adjudicated by a justice of the peace and that no jurisdiction lay to hear the personal damage claim. *Clancey v. McBride*, 169 N.E. 729, 730-31 (Ill. 1929). The lack of jurisdiction to hear a claim precludes the application of *res judicata*. *See id.*

188. Fragments of *Clancey* and the English rule remain part of Illinois jurisprudence in the form of the statutory subrogation exception to the rule against claim-splitting. *See 735 Ill. Comp. Stat. 5/2-403(d) (2008).* This exception addresses *Clancey*'s concern that res
From a historical perspective, *Clancey* ran a parallel track to traditional claim-splitting law. This proposition is supported by the fact that until *Clancey*, it does not appear that Illinois’ courts were faced with a situation where personal injury and property damage arose from a defendant’s single course of conduct. Additionally, traditional claim-splitting rulings continued to be issued alongside *Clancey’s* progeny.\(^{189}\) *Clancey’s* effective dates ran from 1929 until 1996 when *Rein* was decided. Throughout this period of time, the courts did not broadly incorporate the English rule into the larger body of Illinois res judicata jurisprudence. As we shall next see, the Illinois courts began fashioning broader claim-splitting law involving voluntary dismissals.

### III. THE JUDICIAL EXPANSION OF THE RULE AGAINST CLAIM-SPLITTING AND VOLUNTARY DISMISSALS

Voluntary dismissals created new sets of problems, which led to the judge-made creation of two new and broader claim-splitting species. The first involved the use of voluntary dismissals to generate final orders for purposes of appeal, as generally represented by *Rein v. David A. Noyes & Co*. The second species can be characterized as a near per se rule that voluntary dismissals, when taken after a partial adjudication of the case, results in claim-splitting, even in the absence of an appeal. These species are depicted as a new branch (right hand-side), in Figure One.\(^{190}\)

The line of cases that led to *Rein* was born out of the Illinois Supreme Court’s disapproval of plaintiffs engaging in piecemeal appeals rather than moving their full cases through trial. One of the first was *Baird & Warner, Inc. v. Addison Industrial Park, Inc.*\(^{191}\) in which the plaintiff filed a multiple count lawsuit seeking unpaid compensation on a brokerage contract.
The *Baird* plaintiff had originally filed a ten-count complaint, and more specifically alleged in counts I, II, V and IX quantum meruit, breach of contract, and tortious interference against defendants Arnold Rudd, (Addison’s president), and Bliss & Laughlin Industries, respectively.\(^1\) Summary judgment was later granted in favor of defendant Bliss & Laughlin on count IX.\(^2\) Subsequently, counts I and IX—along with other counts—were voluntarily dismissed.\(^3\) A jury rendered a verdict for the defendants on counts II and V of the complaint, upon which the earlier summary judgment became final.\(^4\) The jury’s verdict on counts II and V were unsuccessfully appealed.

Following its loss in the appellate court, and almost one year after it had taken a voluntary dismissal, the *Baird* plaintiff refiled the voluntarily dismissed counts in addition to the adjudicated count V.\(^5\)

The *Baird* court began its analysis by referencing the voluntary dismissal statute and summarized that “a voluntary dismissal is not a bar to another suit for the same cause, assuming, of course, that the second action is timely filed.”\(^6\) On its face, it appeared that by invoking a voluntary dismissal, the *Baird* plaintiff had preserved its right to have those specific claims litigated. The court, however, next counteracted the effects of the statute by fashioning a new rule. Since the plaintiff had voluntarily non-suited only part of its original lawsuit while allowing other counts to go to judgment, and later appeal, it had engaged in splitting up its original lawsuit.\(^7\)

The court felt that the *Baird* plaintiff was simply trying to get a second bite at the proverbial apple. The linchpin of the new rule was that judgments had been entered on part of the original lawsuit. Under the court’s reasoning, these adjudicated counts worked to extinguish the residual, untried counts.\(^8\) Noteworthy about the *Baird* analysis was that it relied upon

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1. *id.* at 836.
2. *id.*
3. *id.* (noting that the summary judgment on count IX was never vacated).
4. *id.* at 837.
5. *id.*
7. *id.* The *Baird* plaintiff had invoked its voluntary dismissal on January 22, 1975, and refiled the applicable counts on February 2, 1976. *Id.*
8. *id.*
9. *See id.* at 839. In some respects, this would seem to fall under the rule from *Camp v. Morgan* where the plaintiff raised all claims in his first lawsuit before surrendering some of them before judgment was entered. *Id.* A major distinction was that the *Camp* plaintiff, unlike the *Baird* plaintiff, did not invoke a non-suit in an attempt to preserve the claim. *Id.*
10. *id.* at 837 (“However, here the plaintiff dismissed only some of its claims; others went to judgment. Generally, a plaintiff cannot divide an entire demand or cause of action so as to maintain several actions for his recovery.”).
traditional claim-splitting cases that did not involve voluntary dismissals. Rather, these older cases involved plaintiffs actually trying to get a second bite at the apple by filing subsequent lawsuits on new theories.

The Baird plaintiff actually raised all of its theories of recovery in its first action. The court cited the fundamental rule that "res judicata embraces not only what actually was determined in the former case . . . but it extends to any other matters properly involved which might have been raised and determined." However, the Baird court was not precisely following this language. Whereas in past traditional claim-splitting cases there had been a wholesale surrender or omission of a theory or requested remedy by a plaintiff in the first lawsuit, which prevented any determination of the omitted issues, such as in In re Northwestern University, the Baird court was effectively transforming the dispositive phrase "might have been raised and determined" to "raised or determined." This is a much different and broader interpretation. Baird dropped the two-pronged requirement that an issue in the original action must have been (1) capable of being raised (i.e., facts underlying the claim were known to the plaintiff at the time of filing as in Rogers v. Higgins and In re Northwestern University); and (2) that the theory could have been capable of adjudication in the original suit. Under Baird's reformulation, a party could raise a theory or claim for relief in the original lawsuit, but if that claim or theory failed to be "determined" (i.e., brought to final decision), it could be used against the plaintiff as res judicata under the rule against claim-splitting. Baird read out the traditional requirement that a plaintiff had to have omitted their known claim for relief, either negligently or purposefully, in the first action. The claim-splitting bar morphed from a defensive antirecapture mechanism into an offensive sword.

This new interpretation was not only a divergence from traditional claim-splitting doctrine expressed in the early case law, but it also allowed for the court to avoid the application of the voluntary dismissal statute. While the court in Baird was no doubt trying to prevent the door to repetitive litigation from being opened in a new manner, via piecemeal appeals,

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201. The Baird court relied primarily upon Pratt, Prochostsky, and Ernest Freeman & Co. See generally Baird, 387 N.E.2d at 837.
202. Baird, 387 N.E.2d at 837 (quoting Phelps v. City of Chicago, 162 N.E. 119, 122 (Ill. 1928)).
203. In re Assessment of Prop. of Nw. Univ., 69 N.E. 75 (1903).
204. Baird, 387 N.E.2d at 838.
205. Id. at 839. "Determination" is defined as "[a] final decision by a court or administrative agency." BLACK'S LAW DICTIONARY 460 (9th ed. 2009).
the reasoning behind these efforts was based on a flawed reading of earlier case law.\textsuperscript{206}

It cannot be overemphasized that Baird represents the beginning of a new and broader application of res judicata under the claim-splitting bar. The Baird court managed to circumvent the voluntary dismissal statute and found that the use of this nonprejudicial procedural tool to make partial judgment orders final and appealable was a form of claim-splitting that subjected a plaintiff’s refilled action to prejudicial dismissal. With this rule in place, the Illinois Supreme Court’s decision in Rein appears unremarkable.

In Rein, the plaintiffs brought a fraud lawsuit against a securities broker. Two of the Reins’ four counts alleged that the defendants had violated provisions of the Illinois Securities Law of 1953\textsuperscript{207} while the other two alleged that the defendants had committed common law fraud.\textsuperscript{208} Co-plaintiff Miller brought identical counts against the defendant.\textsuperscript{209} A third plaintiff, Fehmann, originally brought a separate action seeking rescission and alleging statutory violations and fraudulent misrepresentation in the sale of securities against the same defendant.\textsuperscript{210} Essentially, the Fehmann action was identical to that brought by Rein and Miller.\textsuperscript{211} On motion, the Fehmann lawsuit was consolidated with the Reins’.\textsuperscript{212} The defendants then moved for dismissal of the Securities law violation counts arguing that the statute of limitations had passed on those theories.\textsuperscript{213} The trial court granted the dismissal with prejudice.\textsuperscript{214} The plaintiffs sought leave to amend their complaint and to further plead equitable estoppel as a means of overcoming the statute of limitations.\textsuperscript{215} The trial court refused this request believing that equitable estoppel would still base the cause of action within the scope of

\textsuperscript{206.} The court in Baird did express that its main goal was to exercise its power to prevent repetitive litigation. Baird, 387 N.E.2d at 837 (“This rule is founded upon the plainest and most substantial justice, that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of suits.”). The court, in applying the claim-splitting bar, went through a painstaking analysis of the factual basis underlying the second complaint. Id. It found that res judicata did not apply to all of the Baird plaintiff’s counts because some allegations arose out of a core of facts, which differed from those in the earlier adjudicated lawsuit. Id. Therefore, using the transactional cause of action analysis, the court found that some of the plaintiff’s theories could move forward. Id.

\textsuperscript{207.} See 815 ILL. COMP. STAT. 5/12(F-G) (2009).


\textsuperscript{209.} Id.

\textsuperscript{210.} Id. at 1202.

\textsuperscript{211.} Id.

\textsuperscript{212.} Id.

\textsuperscript{213.} See Rein, 665 N.E.2d at 1202. See generally 815 ILL. COMP. STAT. 2/13(D) (2009) (setting a statute of limitations of three years from the date of the sale of the security).

\textsuperscript{214.} Rein, 665 N.E.2d at 1202.

\textsuperscript{215.} Id.
the 1953 Securities Law and its statute of limitations. The trial court also refused to bestow Illinois Supreme Court Rule 304(a) certification, which would have allowed for partial appeal. Rather than moving forward with their common law fraud theories, the plaintiffs voluntarily dismissed their common law fraud counts. After taking the voluntary dismissal, the plaintiffs’ unsuccessfully appealed the adjudicated counts. The plaintiffs next refilled their common law fraud and rescission theories some nineteen months after taking a voluntary non-suit. The defendant responded by bringing a motion to dismiss the common law claims under res judicata. The trial court granted the dismissal with prejudice based on res judicata, and the decision was affirmed by the appellate court.

Justice Miller’s analysis in Rein can be broken down into two distinct sections. The first part of the opinion focuses on the res judicata triple identity test and Illinois Supreme Court Rule 273, which states:

Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits.

A dismissal based upon the expiration of the statute of limitations is involuntary under 735 ILCS 5/2-619(a)(5) and is an adjudication on the merits. The supreme court also found that the plaintiffs’ causes of action and the parties were identical in the two lawsuits. Therefore, the triple identi-

216. Id.
217. Id. See also ILL. SUP. CT. R. 304(a) (2005) (“If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express finding that there is no just reason for delaying either enforcement or appeal or both.”).
218. See Rein, 665 N.E.2d at 1202.
219. Id. See also Rein v. David A. Noyes & Co. (Rein I), 595 N.E.2d 565 (Ill. App. Ct. 1992), aff’d, 665 N.E.2d 1199 (Ill. 1996)).
221. Id. at 1203.
222. Id. at 1203 (citing the appellate court’s opinion in Rein v. David A. Noyes & Co. (Rein II), 649 N.E.2d 64 (Ill. App. Ct. 1995)).
224. 735 ILL. COMP. STAT. 5/2-619 (West 2005) (“(a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds . . . . (5) That the action was not commenced within the time limited by law.”).
225. Rein, 665 N.E.2d at 1204 (“There is certainly an identity of causes of action since plaintiffs are suing defendants for rescission of their securities purchases in the present action based on the same facts that gave rise to the rescission counts in the 1990 complaints.
ty test for res judicata had been met. As such, the rescission claims were barred. The court next dealt with the refiled common law theories and claim-splitting.

It is here that Justice Miller's opinion made the same interpretational error that the appellate court made in Baird. While stating the rule that res judicata and the rule against claims splitting extended to claims that "might have been raised and determined,"226 the court applied the Baird construction, which changed the qualifying "and" into an "or." Again, the old language—established in the early cases, such as Rogers and Northwestern University—presupposes that a plaintiff failed to even raise a justiciable issue or make a remedial request in their original action.227 The court correctly noted that under the transactional identity test, all of the plaintiffs' claims arose out of the same nucleus of operative facts.228 This meant that under the traditional claim-splitting doctrine, the Rein plaintiffs were required to plead their common law theories in the first action or surrender them. Yet, a major distinction between Rein and most of the traditional claim-splitting cases is that the Reins had raised all of their theories of recovery in the first lawsuit. This critical fact is something that the supreme court had trouble reconciling with the language of Rule 273. In order to protect its constitutional regulatory powers, it had to find a way to narrowly erode the plain language of sections 2-1009 and 13-217. This end-run around the statutes was brought into focus when the court weighed in on the voluntary dismissal statute's language:

Although the language of these sections appear to support plaintiffs' contention, we do not believe that these sections should be read to automatically immunize a plaintiff against the bar of res judicata or other legitimate defenses a defendant may assert in response to the refiling of voluntary dismissed counts. If plaintiffs were permitted to proceed on their common law counts, any plaintiff could file an action with multiple counts, obtain a final judgment on the undismissed counts, and if unsuccessful on the counts not dismissed, refile the previously dismissed counts. Such a practice would impair judicial economy and would effec-

Moreover, the parties in both actions are identical. Therefore, the second and third elements of res judicata are met.

226.  Id. at 1205.
227.  See In re Assessment of Prop. of Nw. Univ., 69 N.E. 75 (Ill. 1903).
228.  Rein, 665 N.E.2d at 1206.
tively defeat the public policy underlying res judicata . . . . 229

In essence, the court in Rein was displeased that the mechanical application of the plain and unambiguous language of sections 2-1009 and 13-217 negatively impacted the judiciary’s common law administrative gatekeeping tool. Baird created the interpretive underpinning to reform the rule against claim-splitting when voluntary dismissals were invoked. Rein went a step farther and carved out a new exception to the application of sections 2-1009 and 13-217.

IV. THE REIN ANALYTICAL FRAMEWORK

Rein created an analytical framework for future cases in which the Restatement (Second) of Judgments’ section 26(1) exceptions to the claim-splitting bar play a significant role.230 This framework can be broken down into two prongs as depicted in Figure Two.

In the first prong, the court must determine if the res judicata triple identity test is satisfied. Because claim-splitting is an aspect of the law of preclusion, it will be implicated when the three elements are met. However, as res judicata is an equitable doctrine, equitable discretion may be exercised in its application. With this in mind, the court must turn to the second prong, which, in this article, is labeled the “equity” prong.

Under the equity prong, the court must determine if any of the six enumerated Exceptions to the General Rule Concerning Splitting found in section 26(1) of the Restatement (Second) of Judgments are present.231 If so, res judicata, under the rule against claim-splitting, will not be applied to bar a plaintiff’s claim. The problem created by the court in Rein was that it chose to disregard certain enumerated exceptions.

More specifically, the focus of this error revolves around section 26(1)(b), which is triggered when “[t]he court in the first action has expressly reserved the plaintiff’s right to maintain the second action . . . .”232 Additionally, Comment “b” to section 26 states, “A determination by the court that its judgment is ‘without prejudice’ (or words to that effect) to a second action on the omitted part of the claim . . . should ordinarily be given effect in the second action.”233 Yet, the Rein court simply felt that none of the section 26(1) exceptions applied to the case’s disposition:

229. Id. at 1208 (citations omitted).
230. Id. at 1207.
231. Id.
Nothing in the record indicates that any of these exceptions apply to the present case. . . . Moreover the trial judge's granting plaintiffs' motion to voluntarily dismiss the common law counts without prejudice under section 2-1009 should not be interpreted as immunizing plaintiffs against defenses defendants may raise when the voluntarily dismissed counts were refiled.234

Provided this, *Rein* failed to articulate a specific reason as to why the non-prejudicial nature of voluntary dismissals somehow failed to satisfy the section 26(1) exceptions in general, and section 26(1)(b) in particular. At common law, a plaintiff had the right to voluntarily dismiss their case before a jury rendered a verdict or a judgment was entered in a nonjury trial.235 This right is considered generally absolute.236 By nature and by codification, voluntary dismissals are *without prejudice.*237 A voluntarily dismissed claim may be refiled within one year of the dismissal.238 The plain language of section 26(1)(b), its supporting comment, and the unequivocally clear "without prejudice" language of the voluntary dismissal statute appeared to contradict the result reached in *Rein.*

This nonprejudicial nature of a voluntary non-suit is what preserves the timely right to refile and the "without prejudice" language plays a key role. It operates to save the voluntarily dismissed claim and allows for its refiling. Without this language, the antecedent nature of the first action would be lost and a plaintiff would be prevented from refiling.239 It would be as if no prior claim ever existed. While the two lawsuits are separate filings, they will share a common set of operative facts that give rise to the same *cause of action.* Ignorance of this commonality undermines the non-prejudicial character of a voluntary dismissal itself. Unfortunately, this was the route taken in *Rein* and would form a cornerstone in the dissenting opin-

235. See *Restatement (Second) of Judgments* § 20 cmt. f (1982).
236. *Pines v. Pines*, 635 N.E.2d 986, 992 (Ill. App. Ct. 1975). As discussed later in this article, the Illinois Supreme Court has taken steps to prevent plaintiffs from using voluntary dismissals to avoid pending dispositive motions, such as summary judgment motions and motions to dismiss. Earlier embodiments of the voluntary dismissal statute contained additional restrictions as to the time periods and conditions when a plaintiff could invoke a non-suit. The current version of section 2-1009 is admittedly more liberal in scope than its predecessors, but still imposes some limitations on an invoking plaintiff.
237. See supra note 3 and accompanying text.
239. See 735 ILL. COMP. STAT. 5/2-1009(a) (2005); *Restatement (Second) of Judgments* § 26(1)(b)(1982) (allowing the trial court, upon timely refiling, to hear motions that were pending in the earlier action when the voluntary dismissal order was entered, such as motions to dismiss pursuant to ILL. SUP. CT. R. 103(b)); see also *Hudson*, 889 N.E.2d 210, 231 (Kilbride, J., dissenting).
nion in *Hudson v. City of Chicago.*\(^{240}\) Essentially, *Rein* transformed nonprejudicial voluntary non-suits into prejudicial ones to a limited extent.\(^{241}\) This was not contemplated nor authorized by the plain language of section 2-1009.\(^{242}\)

Also of note is the Restatement’s position on voluntary dismissals in general. Specifically, section 20(b) of the Restatement (Second) of Judgments reads that an exception to res judicata occurs “[w]hen the plaintiff agrees to or elects a nonsuit, (or voluntary dismissal), without prejudice . . .”\(^{243}\) While the Restatement itself is not binding legal authority, the supreme court decided to rely heavily upon and incorporate it into its analysis.\(^{244}\) As a preliminary matter, under section 20, a voluntary non-suit is an absolute bar to a res judicata defense upon refiling.\(^{245}\)

Instead, *Rein* focused primarily upon the Restatement’s first exception under section 26(1)(a) that the “parties have agreed in terms or in effect that plaintiff may split his claim or the defendant has acquiesced therein . . .”\(^{246}\)

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240. *See infra* Part VI (discussing Justice Kilbridge’s dissent in *Hudson*, 889 N.E.2d at 231 (Kilbridge, J., dissenting)).

241. *See Rein v. David A. Noyes & Co.*, 665 N.E.2d 1199, 1201 (Ill. 1996). The *Rein* holding also appeared to run counter with an earlier statement from the Illinois Supreme Court. In *Stickney v. Goudy*, a traditional claim-splitting case, the court ruled that res judicata barred a breach of contract lawsuit that was predicated upon the same core of facts as an earlier federal lawsuit to enforce a trust agreement. 23 N.E. 1034, 1035 (Ill. 1890). This complaint was later dismissed for want of equity. *Id.* The court held that the federal dismissal barred any other claims that the plaintiffs originally possessed. *Id.* at 1035-36. While *Stickney* did not involve voluntary dismissals, the court, in *dicta*, made a rather curious statement that “[w]here a bill is dismissed without qualification, the decree is conclusive as to all matters involved, which are decided or which might be decided.” *Id.* at 1035. Voluntary dismissals can be categorized as *qualified* dismissals because they are made expressly without prejudice. Hypothetically, under *Stickney*’s statement, a plaintiff invoking a voluntary non-suit when some counts have already been adjudicated may have been able to preserve pending claims and actually *immunize* them from a res judicata defense upon refiling.

242. 735 ILL. COMP. STAT. 5/2-1009 (2008).

243. *RESTATEMENT (SECOND) OF JUDGMENTS § 20(b) (1982).*

244. *See Rein*, 665 N.E.2d at 1206. According to the Restatement (Second) of Judgments,

a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions, out of which the action arose.


245. *See also infra* Part VI (discussing Justice Kilbridge’s dissenting opinions in *Hudson*, 889 N.E.2d at 231 (Kilbridge J., dissenting)).

Justice Miller stressed that the defendants never agreed that the plaintiff could refile the voluntarily dismissed counts.\textsuperscript{247} He found that the defendants’ objection to the refiling was timely made.\textsuperscript{248}

Section 13-217 permits a plaintiff to refile their non-suited action within one year of the dismissal.\textsuperscript{249} Under \textit{Rein}, the power of the plaintiff to refile under this section is jeopardized. Under the statutory scheme of sections 2-1009 and 13-217, a defendant does not have the authority to prevent a plaintiff from refiling. \textit{Rein} expanded a defendant’s leverage over the refiled voluntarily dismissed claims in partial adjudication circumstances. Given the tone of \textit{Rein}, it was expected that the court, in subsequent cases, would do anything it could to proscribe this new form of claim-splitting.

The expanded rule of \textit{Rein} requires that a plaintiff not only needs to raise all of his or her known claims per traditional claim-splitting doctrine in their first lawsuit, but that the use of voluntary dismissals to make previously entered partial judgment orders final and appealable is not acceptable practice. When all was said and done, the \textit{Rein} plaintiffs should have kept moving forward with their case.\textsuperscript{250}

\textit{Rein} could be characterized as a more technically substantive version of \textit{Baird}. The supreme court can be viewed as exercising its rule-making power, while striving to avoid the application of the voluntary dismissal statute because of fear that the statute would be used to encourage piecemeal appeals. Admittedly, the \textit{Rein} court had every right to maintain the judicial system and prevent procedural abuse. What is problematic is how the justices went about exercising that power.\textsuperscript{251} \textit{Rein} would likely have avoided an intractable mess had it not adopted the Restatement’s section 26(1) exceptions. By creating a fluid analytical model that it had no intention of following to the letter, \textit{Rein} only invited more controversy. The court, could easily have made its ruling relying upon its constitutional power to regulate the Illinois court system as it had done on previous occasions during the 1980’s.\textsuperscript{252}

Instead, the \textit{Rein} court responded prophylactically and proceeded to create a new species of claim-splitting, which sought to prevent the use of voluntary dismissals to advance piecemeal appeals in multicount lawsuits. In doing so, the Illinois Supreme Court created a new analytical framework

\begin{itemize}
  \item \textsuperscript{247} Id.
  \item \textsuperscript{248} Id.
  \item \textsuperscript{249} 735 ILL. COMP. STAT. 5/13-217 (2011).
  \item \textsuperscript{250} See \textit{Rein}, 665 N.E.2d at 1207.
  \item \textsuperscript{251} See id.
  \item \textsuperscript{252} See infra Part V.
\end{itemize}
for claim-splitting cases implicating voluntary dismissals. However, later cases did a poor job applying it.253

_Dubina v. Mesirow Realty Development, Inc._ arose, in-part, out of a contribution action.254 Originally, the plaintiffs had brought a lawsuit claiming that the negligence of the defendants—who were both their building managers, repair contractors, and subcontractors—started a fire during a property renovation, which damaged or destroyed the plaintiffs’ art galleries located inside the property being renovated.255 The codefendants also filed crossclaims against each other for contribution.256 The plaintiffs later settled their claims with all of the defendants except one, Litgen.257 As a condition to the settlement, the plaintiffs’ direct claims against Litgen were to be assigned to Mesirow.258 After finding that the settlement agreement satisfied the Joint Tortfeasor Contribution Act,259 the contribution claims between Litgen and the other defendants were dismissed with prejudice.260 The plaintiffs’ direct claims against Litgen remained pending and were later voluntarily dismissed without prejudice.261 After the non-suit was invoked, Litgen appealed the good-faith finding.262 While the appeal was pending, Mesirow refiled the earlier non-suited action against Litgen.263 The appellate court determined that it lacked jurisdiction to hear Litgen’s appeal because the case had been refiled.264 The supreme court reversed and remanded, holding that the appellate court did, in fact, have jurisdiction to hear Litgen’s appeal.265

_Dubina_ is not, in and of itself, a claim-splitting case. However, the court made extensive use of _Rein_. The court held that voluntary dismissals transform final nonappealable orders into appealable ones under Illinois Supreme Court Rule 301,266 and that refiled actions under section 13-217 are separate and distinct from their case of origin.267 Discussing _Rein_, the

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254. Dubina, 687 N.E.2d at 871.
255. Id. at 873.
256. Id.
257. Id.
258. Id.
259. See 740 ILL. COMP. STAT. 100/2 (West 2005).
260. Dubina, 687 N.E.2d at 873.
261. Id.
262. Id.
263. Id.
264. Id.
265. Dubina, 687 N.E.2d at 875.
266. Id. Illinois Supreme Court Rule 301 states in-part that “[e]very final judgment of a circuit court in a civil case is appealable as of right.” ILL. SUP. CT. R. 301 (2005).
267. Dubina, 687 N.E.2d at 875 (“The definition of ‘final,’ for purposes of Rule 301, is well settled, and application of Rule 301 is relatively straightforward. We note that the
court stated, “Final judgments entered in the first suit are not treated as a nullity—they have consequences. . . . [F]inal judgments followed by a voluntary dismissal [are] treated the same as final judgments entered in other actions.” However, the court did not address whether it would be equitable for partial adjudications on the merits to bar un-adjudicated counts in the context of claim-splitting. This question was well beyond the scope of the facts in Dubina. The opinion in Dubina would later be adapted to fit Hudson.

Dubina represented an unusual situation where the defendants were challenging the plaintiffs’ assertion that the refiling of a voluntarily dismissed case extinguished the appellate court’s jurisdiction over Litgen’s appeal. The Dubina plaintiffs were not seeking to advance a piecemeal appeal. The supreme court further noted that the circumstances present in Dubina were unlikely to promote such improper conduct.

In Estate of Cooper v. Humana Health Plan, Inc., the appellate court brought together the teachings of Rein and Dubina in a claim-splitting situation. In Cooper, a wrongful death action, the plaintiff’s estate originally filed its lawsuit against Humana, West Suburban Hospital and Doctors Alter and Horras. The complaint alleged that the doctors had failed to diagnose excessive Coumadin treatment when the decedent was taken to the West Suburban Hospital’s emergency room. The original complaint failed to plead negligence against any agents of West Suburban Hospital. A nearly identical second amended complaint was later filed. This amended complaint also failed to plead negligence and agency theories against the hospital. The defendants filed motions for summary judgment. In its response brief, the plaintiff finally alleged that West Suburban Hospital was vicariously liable and sought emergency leave to amend their complaint. The trial court denied the request for leave to amend.

__refiled action is an entirely new and separate action, not a reinstatement of the old actionBecause they are distinct actions, when the original action was terminated, the circuit court lost jurisdiction of the original action and all final orders became appealable under Rule 301.” (citations omitted).

 268. Id. at 876.
 270. Dubina, 687 N.E.2d at 876.
 272. Id. at 362.
 273. Id.
 274. Id.
 275. Id.
 276. See Cooper, 789 N.E.2d at 362-63.
 277. Id.
 278. Id. at 363.
mary judgment was then entered in favor of Humana and Dr. Alter on issues of negligence.\textsuperscript{279} Partial summary judgment was granted in favor of West Suburban Hospital on the question of negligence by any hospital employees.\textsuperscript{280} The trial court also struck Rule 304(a) certification language from these orders.\textsuperscript{281} The claims against Dr. Horras remained pending.\textsuperscript{282} Some time after these summary findings were entered, the plaintiff voluntarily non-suited the case without prejudice and with leave to refile within one year.\textsuperscript{283}

The plaintiff timely refiled its lawsuit, but in this second iteration, negligence and agency theories were pled against West Suburban, Humana and the two original doctors.\textsuperscript{284} The trial court dismissed the refiled action based upon res judicata.\textsuperscript{285} Applying \textit{Rein} and \textit{Dubina}, the First Appellate District affirmed the trial court’s ruling.\textsuperscript{286}

The court started with the question of procedural status. Under \textit{Dubina}, prior to the \textit{Cooper} plaintiff’s voluntary dismissal, the partial summary judgment orders were final but not appealable.\textsuperscript{287} It was noted that the circuit court did not grant Rule 304(a) certification in the original lawsuit, which compelled the parties to move the remainder of the case forward. When the voluntary dismissal was entered, summary judgment orders became both final and appealable under Rule 301.\textsuperscript{288} The \textit{Cooper} plaintiff did not file any appeal of the partial judgments, but instead timely refiled the lawsuit under section 13-217.\textsuperscript{289}

The \textit{Cooper} court effectively bundled \textit{Dubina} and \textit{Rein}. First, the rule from \textit{Dubina} was applied in order to transform the earlier partial adjudications on the merits into final judgments for purposes of Rule 273.\textsuperscript{290} Next, Justice South applied \textit{Rein}, holding that because the earlier partial adjudications were made final by the voluntary dismissal, the triple identity test for res judicata had been satisfied.\textsuperscript{291} \textit{Cooper} incorporated some of the strongest pronouncements from \textit{Rein} and \textit{Dubina} into a Hudson precursor.

\textit{Cooper} represents a bridge between \textit{Rein} and the current and expansive state of res judicata/claim-splitting law. Significantly, for the first time

\begin{itemize}
\item \textsuperscript{279} \textit{Id.}
\item \textsuperscript{280} \textit{Id.}
\item \textsuperscript{281} \textit{See Cooper}, 789 N.E.2d at 363.
\item \textsuperscript{282} \textit{See id.}
\item \textsuperscript{283} \textit{Id.}
\item \textsuperscript{284} \textit{Id.}
\item \textsuperscript{285} \textit{Id.}
\item \textsuperscript{286} \textit{Cooper}, 789 N.E.2d at 365.
\item \textsuperscript{287} \textit{See id.}
\item \textsuperscript{288} \textit{Id.}
\item \textsuperscript{289} \textit{Cooper}, 789 N.E.2d at 363.
\item \textsuperscript{290} \textit{Id.} at 366.
\item \textsuperscript{291} \textit{See id.}
\end{itemize}
the claim-splitting bar applied to a situation where a plaintiff did not seek to engage in a piecemeal appeal. Piecemeal appeals were expressly the type of behavior that Rein sought to end. Yet, this did not seem to factor into the Cooper opinion. Instead, Justice South took Rein's central holding and concluded, comparing the facts of the two cases, that Rein worked to bar the refiled action since the plaintiff’s allegations “could have been raised and determined in the original cause of action.”

While Cooper depended heavily upon Rein for its claim-splitting analysis, the Cooper plaintiff’s failure to plead all of her applicable theories in the original action made it unnecessary to work the case through the section 26(1) exceptions of the Restatement (Second). This conduct actually transported Cooper into both the scope of Rein and traditional claim-splitting law. The Cooper plaintiff had failed to raise important theories of recovery in its original lawsuit and therefore could not raise them later on after a final judgment had been entered on the case. Such conduct does not comport with the traditional rule that a plaintiff must bring all known claims arising from the same cause of action in its original lawsuit.

Starting with Rein, and followed by Dubina, Cooper, we can see a quiet expansion of the claim-splitting bar. First in a situation where a plaintiff was engaging in piecemeal appeals, followed by a situation where no such appeal was made, but where the plaintiff failed to originally plead a desired theory. A new res judicata jurisprudence was emerging involving voluntary dismissals. Cooper set the stage for the significant expansion of claim-splitting law embodied by Hudson.

V. TOWARD A NEW HORIZON: HUDSON’S CONTINUED EXPANSION OF THE CLAIM-SPLITTING BAR

Hudson v. City of Chicago will undoubtedly be regarded as a seminal case in Illinois res judicata law. It represented further judicial expansion of the claim-splitting bar into the realm of voluntary dismissals. For the first time since Rein, the court applied the analytical framework from the Restatement (Second) of Judgments to a voluntary dismissal and refiling situation in a truly unprecedented manner.

The plaintiff in Hudson brought a wrongful death action alleging a negligence count and a willful and wanton misconduct count against the city of Chicago for its response to an emergency situation that resulted in the death of the minor plaintiff. The city, by motion, asserted as an affir-
mative matter that it could not be held liable under a straight negligence theory pursuant to the Emergency Medical Services Systems Act.295 The Circuit Court of Cook County involuntarily dismissed the plaintiff’s negligence count with prejudice.296 The remaining willful and wanton misconduct count was later voluntarily dismissed pursuant to section 2-1009 prior to trial.297 The willful and wanton misconduct claim was timely refiled.298 The plaintiff did not appeal the dismissal of the negligence count.

The city successfully argued that the refilled claim was barred by res judicata. The plaintiff argued that res judicata could not apply because no decision on the merits had been entered on their willful and wanton misconduct count. The refilled complaint was merely an extension of an issue left open in the predicate lawsuit. The court disagreed and applied the rule from Dubina that a refilled action is “an entirely new action”299 and not a “continuation.”300 After a recitation of the facts from Rein, the justices found the involuntarily dismissed negligence count became res judicata against the refilled willful and wanton count; because the involuntary dismissal was a type of final judgment, albeit a partial one, under Illinois Supreme Court Rule 273.301 The other two elements—identity of parties and cause of action—were not disputed.302 As such, the refilled claim satisfied the res judicata triple identity test.

Consistent with Rein, Chief Justice Thomas said, “We next look to see if any of the exceptions to the rule against claim-splitting are applicable. Just as none of them were present in Rein, none of them are present here. Accordingly, Rein compels an affirmance of the appellate court’s decision.”303 Instead of vigorously probing to see if any of section 26(1) applied, the majority affirmed the analytical framework of Rein in name only.

Interestingly, in a footnote, Chief Justice Thomas and the majority dealt a severe blow to the Rein analytical framework and seemed to forec-

295. See id. (referencing 210 ILL. COMP. STAT. 50/3.150 (West 2000)).
296. 735 ILL. COMP. STAT. 5/2-619 (West 2005)
297. Hudson, 889 N.E.2d at 212.
298. Id.
299. Id. at 214.
300. Id.
301. Id. at 217 (“Rein thus stands for the proposition that a plaintiff who splits his claims by voluntarily dismissing and refiling part of an action after a final judgment has been entered on another part of the case subjects himself to a res judicata defense. Once the holding of Rein is understood, the analysis in the present case becomes an unremarkable exercise.”) This statement by the court might appear to demonstrate that the court had already arrived at a decision to bar Hudson II even before the majority’s brief evaluation of the section 26(1) equitable exceptions. Id. The resulting conclusion that none of these exceptions applied to Hudson II was indeed an “unremarkable exercise.” Id.
303. Id., 889 N.E.2d at 217-18 (emphasis added) (citations omitted).
lose the possibility that the plaintiff could rely upon section 26(1)(b) and the non-prejudicial nature of a voluntary dismissal:

The comments to section 26 of the Restatement indicate that an example of a court expressly maintaining a plaintiff’s right to maintain a second action may be when the court indicates that its judgment is without prejudice to the bringing of a second action. . . . When commenting on this particular exception to claim-splitting, this court explained in Rein that the use of the “without prejudice” language is not sufficient to protect a plaintiff against the bar of res judicata when another part of the plaintiff’s case has gone to final judgment in a previous action . . . .

With this statement, the Hudson court removed the non-prejudicial protections that were inherently and expressly part of the voluntary dismissal’s substance. The Illinois Supreme Court also repudiated part of its own judicially created test while purporting to follow it. This avoidance is evidence that the majority strove to expand Rein while at the same time maintaining that there was no such expansion. As we shall later see, appellate court panels have struggled applying such a blanket rule.

From a practical perspective, the Hudson majority relied upon a stringent factual comparison with Rein’s distinguishable procedural pattern so as to arrive at their desired conclusion. Chief among these differences was that the Hudson plaintiff did not attempt to file an appeal or seek Rule 304(a) certification of the involuntary dismissed count whereas the plaintiffs in Rein did.

As will be recalled, a major concern echoed by the court in Rein was that litigants were abusing the voluntary dismissal statute in order to advance piecemeal appeals. The Hudson plaintiff attempted to distinguish his case from Rein saying that Rein “set forth a ‘case-specific, anti-abuse

304. *Id.* at 216, n. 2 (emphasis in the original) (citations omitted). It should be pointed out that the Rein opinion does not specifically discuss the application of the §26(1)(b) equitable exception to the rule against claim-splitting. *Id.*

305. *Id.* at 220. The court, addressing the Hudson plaintiff’s argument that Rein’s application would mean that “whenever any count in a multi-count complaint is dismissed on the merits, none of the surviving counts may be voluntarily dismissed and subsequently refiled,” said that this was not the case because Rein applied the section 26(1) exceptions. *Id.*

306. *See generally id.* at 221-23. That the Rein plaintiff appeared to use section 2-1009 to advance a piecemeal appeal while the Hudson plaintiff was not lost upon the Illinois Trial Lawyers Association who filed an amicus brief in support of George Hudson. *Id.*

307. *See Rein*, 665 N.E.2d at 1199, 1208 (“Moreover, an interpretation contrary to that reached here would emasculate Rule 304(a) by allowing a plaintiff to circumvent a trial judge’s denial of a Rule 304(a) certification by refiling previously dismissed counts following an unsuccessful judgment or appeal on counts not previously dismissed.”).
It was clearly evident from the facts in Rein that the plaintiffs had sought Rule 304(a) certification and then attempted a piecemeal appeal when said certification was denied. Yet, Hudson brushed this aside, labeling it a “distinction without a difference.” It further said that the policy reasons expressed in Rein were simply expressions that “the court gave in favor of the result it had already reached.” The public policy reasons did not make up the basis for the holding in Rein. Instead, Rein was founded upon the res judicata triple identity test. This was a remarkable proposition, because in Rein the court made it clear that it was acting to protect judicial economy and policy interests. If the court in Hudson was going to reach a conclusion based on matching up the fact patterns with Rein, and not based on the presence or absence of the Restatement’s exceptions, then it was obligated to factor into its decision the objective fact that no appeal of the Hudson plaintiff’s involuntary dismissed count was sought. The plaintiff in Hudson was simply not engaged in the same type of procedural abuse that was being culled in Rein.

In its amicus brief, the Illinois Trial Lawyers Association (ITLA) tried to paint Rein for what it was: plaintiffs who were trying to end-run a trial court’s refusal to grant Rule 304(a) certification. As such, Rein should not have been applied to Hudson because such conduct was absent. The ITLA also argued that by applying Rein to Hudson’s refiled claims, the supreme court would be intruding upon the powers of the Illinois General Assembly.

The Hudson majority dismissed the ITLA’s Rule 304(a) certification argument and countered on four main points. First, it made the observation that because Rein’s discussion of Rule 304(a) circumvention comprised only a fraction of that total opinion, it could not be a central and important component of the ruling:

First, it is difficult to accept ITLA’s assertion that this court’s true concern in Rein was that the plaintiffs used the voluntary non-suit and refile procedure as a means of cir-
cumventing the trial court’s denial of Rule 304(a) certification. It seems unlikely that, if this were the court’s true concern, this court would not have devoted a single sentence to the issue and buried it at the end of an 11 paragraph discussion that is simply window dressing. Rather, it seems clear that the court’s true concern in Rein was exactly what this court stated it to be: the plaintiffs split their claims into multiple actions.317

This line of reasoning is perplexing at best. If policy concerns were not at the center of Rein, as suggested by the Hudson majority, such concern would not have been expressed in Rein in the first place.318 This tone suggests that the court was committed to expanding the scope of Rein into more of a technical, bright-line rule.

The ITLA had asked the Hudson court to contain the scope of Rein using the court's earlier expressed public policy concerns of curbing piecemeal appeals.319 In a subsequent point, the Hudson majority actually raised the same public policy concern, quoting from Rein, which it claimed was not central to Rein’s holding.320 The Hudson majority opined that in light of public policy, the “ITLA fail[ed] to explain how rewriting Rein to apply only to those plaintiffs who use voluntary dismissal as a means of circumventing the denial of Rule 304(a) certification would address this concern . . . .”321

By confining the res judicata claim-splitting bar to litigants who sought piecemeal appeals as the ITLA advocated, the intent of the appellant would have become a central objective factor as to whether appellate abuse was an end goal. This was the exact opposite of the Hudson majority’s holding. Therefore, reading the narrow policy objective of preventing piecemeal appeals out of the equation in Hudson resulted in a judicial expansion of Rein. If not for this broadening of Rein’s scope, the rule against claim-splitting would not have become the punitive, offensive measure that it has become. The Hudson majority even posed the question as to how a court would determine whether a plaintiff was using a voluntary dismissal to circumvent Rule 304(a) certification. The court felt that under the ITLA’s proposal:

317. Id.
318. See Rein, 665 N.E.2d at 1206-1207. The public policy concerns are incorporated into the adopted section 26(1) equitable exceptions. Id. For a further discussion of the public policy concerns and the concerns about the circumvention of Rule 304(a) certification, see id. at 1208.
319. Id. at 1206-07.
320. Hudson, 889 N.E.2d at 221 (citing Rein, 665 N.E.2d at 1208).
321. Id.
the plaintiff who is determined to appeal the dismissed counts at all costs would likely not even ask for Rule 304(a) certification before voluntarily dismissing the remaining counts. This way, he or she would not have to run the risk of . . . later being accused of circumventing the denial of Rule 304(a) certification.322

Therefore, according to *Hudson*, the ITLA’s proposal to limit the scope of *Rein* would actually have a counter-effect resulting in the true emasculation of Rule 304(a).323

There is additional evidence that the *Hudson* majority’s rejection of the ITLA’s position was not on solid footing. *Hudson*, as noted by the ITLA, was not the only example of a situation where the Illinois Supreme Court decided to limit the scope of sections 2-1009 and 13-217 in light of perceived procedural abuse involving a supreme court rule.324 In *O’Connell v. St. Francis Hospital*,325 the court refused to indulge a plaintiff who sought to escape the effects of Illinois Supreme Court Rule 103(b) using section 2-1009. In *O’Connell*, a medical malpractice suit, the plaintiff waited eight months after filing his lawsuit to serve the defendants.326 The defendants filed a motion to dismiss the case with prejudice pursuant to Rule 103(b) arguing that the plaintiff had not been diligent in effectuating service.327 After allowing a continuance in the briefing of the motion, the plaintiff moved for a voluntary non-suit and the defendants’ motions were never heard.328 The plaintiff timely refiled the lawsuit, and the defendants again sought dismissal based on their previously pending motions.329 Without a hearing, the trial court denied defendants’ renewed Rule 103(b) motions, which were affirmed on appeal.330

Reversing the appellate court, the Illinois Supreme Court held in *O’Connell* that the plaintiff’s use of the non-suit was clearly an attempt to avoid the application of Rule 103(b).331 Although a plaintiff has the abso-
lute right to voluntarily dismiss and refile by statute, the application of these statutes undermined the purpose of Rule 103(b), which was enacted to effectuate fair and prompt justice.332 Simply put, the *O’Connell* plaintiff

322. *Id.* at 222.
323. *Id.*
324. *Id.* at 221.
326. *Id.* at 1324.
327. *Id.*
328. *Id.*
329. *Id.*
330. *O’Connell, 492 N.E.2d* at 1324.
331. *Id.* at 1326-27.
332. *Id.* at 1326.
could not use the non-suit to escape his earlier alleged violation of Rule 103(b) because doing so blocked the court from rendering a judgment.\textsuperscript{333} O'Connell held that any Rule 103(b) motions pending at the time a voluntary dismissal was entered, may be reheard by the court upon the refiling of the lawsuit.\textsuperscript{334}

O'Connell demonstrated that when faced with a situation where a plaintiff has used sections 2-1009 and 13-217 in an abusive manner, the court was more than willing to craft narrow holdings to counter the end-run. The Hudson court should have narrowly applied Rein for what it was: a case seeking to prevent abuse of voluntary dismissals to overcome the denial of Rule 304(a) certification and/or to prevent piecemeal appeals.

The ITLA also argued that applying the claim-splitting bar in Hudson would violate the separation of powers between the Illinois judiciary and legislative branches.\textsuperscript{335} As mentioned in the beginning of this article, the state constitution grants the Illinois Supreme Court the authority to promulgate procedural rules, which allow the judicial branch to carry out its duties.\textsuperscript{336} In some circumstances, the judicial rule making power is concurrent with the lawmaking powers of the General Assembly.\textsuperscript{337} Where a Supreme Court Rule, concerning a matter within the court's authority, conflicts with a statute on the same subject, the statute is preempted.\textsuperscript{338}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 1327. The court stated, Under such circumstances, sections 2-1009 and 13-217 constitute an undue infringement upon the judiciary as it seeks to discharge its duties fairly and expeditiously. Further, insofar as section 2-1009 directs the circuit court to dismiss a case, it unduly infringes upon the fundamental, exclusive authority of the judiciary to render judgments.

\textit{Id.} This language would appear to be ambiguous as to whether it applies only to specific instances of procedural abuse or if the court is declaring that section 2-1009 is unconstitutional. The latter is unlikely as trial courts routinely allow voluntary dismissals, so long as they are timely, (as evidenced by the multiple voluntary dismissal/claim-splitting cases heard before the Illinois Supreme Court and appellate courts post-Rein). Further, the O'Connell opinion balances out fairness to defendants by allowing pending Rule 103(b) motions to be heard on refiling. If in fact the court was expressing that voluntary dismissals were wholly unconstitutional, then it would conflict with later pronouncements from the supreme court recognizing that plaintiff's generally have an absolute right to voluntarily dismiss their case without prejudice and with leave to refile. \textit{See}, e.g., Hudson v. City of Chicago, 889 N.E.2d 210, 216-17 (Ill. 2008); Rein v. David A. Noyes & Co., 665 N.E.2d 1199, 1208 (Ill. 1996).

\item O'Connell, 492 N.E.2d at 1327.
\item Hudson, 889 N.E.2d at 222.
\item People v. Callopy, 192 N.E. 634 (Ill. 1934). \textit{See also} discussion, \textit{supra} note 1.
\item People v. Cox, 412 N.E.2d 495 (Ill. 1980).
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
The *Hudson* court elevated res judicata over sections 2-1009 and 13-217 through its "right to regulate the judicial system." The court also found the ITLA's arguments baseless stating that the two statutes did not specifically address claim-splitting situations in their language:

Section 2-1009 gives plaintiffs the right to voluntarily dismiss an action, without prejudice, in whole or in part any time before trial or hearing begins. . . . It is true that the this court has referred to section 13-217 as providing a plaintiff with an 'absolute right' to refile a complaint within one year or within the remaining limitations period, but this description referred only to a plaintiff's rights vis-à-vis the limitations period, which is the only subject addressed by section 13-217. These sections do not address what happens when a plaintiff commences a second action after part of his cause of action has gone to final judgment in a previous case. We see no basis for concluding that the legislature intended section 2-1009 and section 13-217 to give plaintiffs an absolute right to split their claims.

*Hudson*, using an apparent textual approach, was looking for specific language in the voluntary dismissal and refile statutes that would be applicable to claim-splitting scenarios. However, this analysis should not have even been necessary since *Rein* already adopted the Restatement's exceptions, which incorporated voluntary dismissals. There was also no indication that section 2-1009 was promulgated by the General Assembly to obstruct the judiciary's ability to carry out its mandate. Chief Justice Thomas and the majority sidestepped the central question as to whether sections 2-1009 and 13-217 were truly infringing upon the supreme court's power to regulate the judicial system or whether *Hudson* was infringing upon the prerogative of the legislative branch.

From an operative standpoint, section 2-1009 on its face does not impose detailed and intrusive restrictions upon a trial court's ability to render judgments, a task that is considered to be an essential judicial function. It provides a pre-trial time frame as to when a plaintiff may invoke a voluntary dismissal and mandates that such dismissal be without prejudice. After the stated time period has passed, the powers of the trial court increase and the entry of a voluntary dismissal becomes discretionary. What sections 2-1009 and 13-217 do not do is direct the trial courts to enter specific types of judgment orders. To the contrary, section 2-1009 even allows for a trial

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340. *Id.* at 222-23 (citations omitted).
341. Hall v. Marks, 34 Ill. 358, 362 (1864).
court to award costs to the opposing party to remedy the inconvenience incurred by the defendant. Additionally, section 13-217 does not require a plaintiff to refile any of its claims. If a plaintiff decides not to refile under section 13-217, a trial court’s docket is one case lighter and no further judicial resources are expended.  

Admittedly, while section 2-1009 does not on its face infringe the Illinois judiciary’s regulatory power, it can be, and has been used, as described earlier, to block courts from rendering judgments. In such cases, the supreme court has taken a stern but surgical approach. Once more, the O’Connell case is instructive. Justice Moran recognized that the defendants’ pending Rule 103(b) motions quite possibly would have disposed of the plaintiff’s lawsuit. The plaintiff’s use of section 2-1009 effectively prevented the court from hearing and possibly rendering what effectively would have been a prejudicial involuntary dismissal. Justice Moran recognized that section 2-1009 itself was not unconstitutional but the use of the statute under these specific circumstances interfered with the court’s ability to render a judgment after refiling of the action. Hence, O’Connell limited the scope of its ruling to apply to pending Rule 103(b) motions. For the Hudson court to have declined to apply Rein, when no apparent appellate abuse had been engaged in, would have been entirely appropriate and in line with earlier voluntary dismissal, regulatory-type rulings from the supreme court.

The Hudson majority held fast to the idea that the partial adjudication and voluntary dismissal of one of the plaintiff’s theories was a judgment of the entire case. What the opinion failed to discuss was that the language of section 2-1009 mandated that the voluntary dismissal be without prejudice and that such dismissals are exceptions to the rule against claim-splitting. In

342. The extremely liberal and flexible conditions set forth in sections 2-1009 and 13-217 pale in comparison to circumstances where the court found encroachment upon its powers. For example, in Agran v. Checker Taxi Co., 105 N.E.2d 713 (Ill. 1952), the Illinois Supreme Court dealt with severe statutory limitations imposed on the powers of the trial courts when a dismissal for want of prosecution (DWP) was entered. Section 50(a) of the Civil Practice Act required “that no ex-parte action shall be taken to dismiss a case for want of prosecution until every attorney of record has been notified at least five days by the clerk of the court that such action was contemplated on the date that such order was entered.” Id. at 714. The Cook County Circuit Court entered a DWP order when the plaintiff failed to appear when the case was called to trial. The Illinois Supreme Court found that the notice requirements of section 50(a) restricted the court’s ability to render decisions in “intimate detail.” Id. at 715. Because the court’s ability to enter a dismissal order was hampered, section 50(a) was declared unconstitutional under the separation of powers doctrine. Id. at 716.

343. In Gibellina v. Handley, 535 N.E.2d 858 (Ill. 1989), the Illinois Supreme Court vested the trial courts with discretion to hear a defendant’s dispositive motion filed prior to the filing of a motion to voluntarily dismiss. Gibellina did not create a bright line rule that any potentially dispositive motion must be heard if filed prior to a motion for non-suit. See Mizell v. Passo, 590 N.E.2d 449, 551 (Ill. 1992)
order to escape the clutches of section 26(1), the court made the astounding conclusion that because claim-splitting is not mentioned explicitly in the two statutes, they are inapplicable. This failing of logic served as the basis of Chief Justice Kilbride’s vigorous dissent. The majority ended its opinion in *Hudson* by re-asserting that *Rein* was controlling law and based on the similarities between the facts of both cases, the plaintiff had improperly split his claim.344

VI. JUSTICE KILBRIDE’S DISSenting Opinions in Hudson v. City of Chicago

Chief Justice Kilbride’s position set forth in his *Hudson* dissents345 both represent the analysis that this author advocates should be adhered to by Illinois courts in future voluntary dismissal-type of claim-splitting cases. The premise of both *Hudson* dissents was that that the majority ignored its own analytical framework in order to uphold a public policy prerogative, and in the process undermined a protected statutory right. More specifically, Justice Kilbride noted repeatedly that the key operative language “without prejudice” found in section 2-1009 immunized a refiling plaintiff from res judicata.346 Further, support for this proposition is unambiguously set forth in several sections of the Restatement (Second) of Judgments adopted by the court in *Rein* and in *Hudson*.

Justice Kilbride began his attack on the *Hudson* majority by concluding that Rule 273 itself had been improperly interpreted. The majority had stated that the voluntary dismissal and refiling statutes did not expressly address claim-splitting. In a reverse tactic, Justice Kilbride noted that Rule 273 “[did] not, however, provide that an adjudication on the merits is a ‘final’ judgment on the merits, as required for *res judicata* to apply.”347 nor did Rule 273 apply to anything other than involuntary dismissals.348 Justice

344. *Hudson*, 889 N.E.2d at 222 (“As in Rein, plaintiffs commenced a new action after part of their original cause of action had gone to final judgment in a previous case. None of the exceptions to the rule against claim-splitting are present here, and thus *res judicata* barred plaintiffs’ refiled complaint.”).

345. Id. (Kilbride & Fitzgerald, JJ., Dissenting). Justice Kilbride filed an additional dissent upon the Illinois Supreme Court’s denial for rehearing *Hudson*. See id. at 231.


348. Id.
Kilbride provided support for his position by citing to Flores v. Dugan, wherein the court defined a final judgment as a determination of the issues presented in the pleadings, "which ascertains and fixes absolutely and finally the rights of the parties . . . ." In Hudson, there had not been any full decision on the merits of the plaintiff's willful and wanton claim.

The Hudson majority even admitted that the plaintiff's refiled willful and wanton count was never adjudicated. This admission is telling in light of the court's earlier holding in Leow v. A&B Freight Line, Inc., where it said "a dismissal on grounds other than the actual merits of the case would not constitute res judicata in a later case." This proposition can be extended to the voluntary dismissal exception for res judicata because such dismissals do not reach a case's merits. Therefore the un-adjudicated count in Hudson should have been immune from attack. Hudson failed to reconcile how a partial adjudication on the merits under Rule 273 could also be a final judgment on the merits of the entire multi-count lawsuit.

Next, Justice Kilbride addressed the non-prejudicial nature of a voluntary dismissal as well as the propriety of a plaintiff filing an appeal after invoking one, as was the case in Reim. Justice Kilbride began this section of his dissent by quoting the non-prejudicial language of section 2-1009 and reasoning that this operative language protected the plaintiff's claim upon refiling. Further, because the right to refile within the time limits laid down in section 13-217 is absolute, such a dismissal order could not be final and appealable. Justice Kilbride relied mostly upon Flores, Wold v. Bull Valley Management Co. and Kahle v. John Deere Co. Flores and Wold dealt with the issue of whether dismissals for want of prosecution constituted final and appealable judgment orders. The answer to that question had been decided in the negative by the Illinois Supreme Court because

349. See Flores v. Dugan, 435 N.E.2d 480 (Ill. 1982); see also Elliott v. LRSL Enter., Inc., 589 N.E.2d 1074, 1077 (Ill. App. Ct. 1992) ("A judgment is final for purposes of res judicata if it terminates litigation on the merits so that the only issue remaining is proceeding with its execution."); BLACK'S LAW DICTIONARY 859 (8th ed. 2004) (defining final judgment as "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and sometimes, attorney's fees) and enforcement of the judgment.").

350. Flores, 435 N.E.2d at 482.

351. Hudson, 889 N.E.2d at 215 ("Although there was not an adjudication on the merits of the [willful and wanton count] in [Hudson I], the concept of res judicata is broader than plaintiffs suggest."). The court applied the claim-splitting philosophy of res judicata—where it had never been applied to before under traditional claim-splitting law—where a plaintiff had raised all issues in the first instance. Id.


354. Id. at 225.


a plaintiff has an absolute right to refile a dismissal for want of prosecution within certain time limits. The dissent then noted that the court in Kahle had extended this rule to voluntary dismissals.

What Kahle did not do, as the dissent points out, was create a jurisdictional basis for appeal as had been done by the plaintiffs in Rein. Rather, the only basis for appeal stemming from a voluntary dismissal would be whether it had been properly granted by a trial court.

This jurisdictional confusion carried over into Dubina where the court held that pending non-final orders became final and appealable when a voluntary dismissal is entered on the remainder of a case. Justice Kilbride felt that Dubina’s reliance on Rein was misplaced, especially because the defendant was seeking to appeal the propriety of a voluntary dismissal and not a plaintiff using a non-suit to advance a piecemeal appeal. Instead, the dissent suggested that Dubina should have based its rationale on Kahle’s holding that an appeal cannot be taken by a plaintiff after he invokes a non-suit because he has an absolute right to refile. By not taking an appeal, a plaintiff would not be engaged in improper claim-splitting as defined by the Hudson majority.

Having addressed the perceived defects of the Chief Justice’s opinion, Justice Kilbride turned his attention to the majority’s seeming inability to hold fast to the Rein analytical framework. He criticized the majority for having been “less than clear in determining whether a plaintiff’s refiled complaint constitutes a new action or a continuation of a voluntarily dismissed action.” Discussing this predication concept, the majority relied upon Dubina for the proposition that an original, voluntarily non-sued parent action and its timely refiled child are separate and distinct. However, the dissent felt that the reasoning and reliance upon this body of case law was dangerously flawed as the cited cases did not address the exact relationship between the parent and child actions under sections 2-1009 and 13-217.

It is this article’s stance that Justice Kilbride’s position on the question of predication to be the correct one to take in voluntary dismissal-type

358. Id. at 226.
359. Id. at 227.
360. Id. at 225-26.
361. Id. at 226.
363. Id.
364. Id.
claim-splitting situations. Justice Kilbride thought it absurd that the majority could believe that a timely refiled action bore absolutely no relationship to its voluntarily non-sued parent. The majority's conclusion made little sense when it was well known that courts in refiled actions could take judicial notice of earlier rulings and admissions on the same cause of action. He singled out the rule that in voluntarily dismissed and refiled cases, a court may hear a motion for dismissal under Illinois Supreme Court Rule 103(b) if filed and pending prior to the entering of a non-suit. If the courts were willing to reach back to the original parent lawsuits in instances, such as Rule 103(b), how could the *Hudson* majority now conclude that the parent and child lawsuits were unrelated? As a procedural and precedential reality,

[I]t is not as if plaintiffs' prior cause of action never existed. Rather, from a procedural standpoint, the refiled action is a new and distinct suit treated as a continuation of the former suit, and there can be no doubt that all prior rulings are binding in the second action. In fact, an action refiled pursuant to section 13-217 is premised on the preexisting action. Without the predicate case, there could be no refiled under section 13-217. Thus it cannot be logically be viewed as a completely new cause of action.

Justice Kilbride's opinion demonstrated the *Hudson* majority's lack of consistency on the relationship between parent and child actions. The majority's failure to even consider that rulings and certain pending motions in an original, parent lawsuit carry-over into the refiled child, suggested that the court was striving to avoid the technical effect of the statute for no other reason than to preserve and assert its own authority from a wrongfully perceived intrusion. In the interest of having a uniform body of law, it made little practical sense why the *Hudson* majority treated parent and refiled child lawsuits as separate and unconnected when cases like *O'Connell* did

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367. *See id. at 227-28.*
368. *Id. at 227* (citing People v. Davis, 357 N.E.2d 792 (Ill. 1976) and Kenneth S. Broun, MCCORMACK ON EVIDENCE, § 330, at 766 (2nd ed. 1972) ("Obviously, the refiled action is assigned a new case number in the circuit court, but equally as obvious, the trial court is required to take judicial notice of rulings in prior proceedings.").
369. *Id.* (citing to Case v. Galesburg Cottage Hosp., 880 N.E.2d 171 (Ill. 2007)). It should be noted that this situation was also addressed in *O'Connell* and was further codified into the voluntary dismissal statute at Section 2-1009(b), which states, "[t]he court may hear and decide a motion that has been filed prior to a motion filed under subsection (a) of this Section when that prior filed motion, if favorably ruled upon by the court, could result in a final disposition of the cause." (West 2005)).
the exact opposite. Justice Kilbride brought this more into focus when he next discussed the Hudson majority’s failure to follow and apply the section 26(1) equitable exceptions.

As illustrated in Figure Two, the Rein framework requires that a court first determine if the triple identity test for res judicata is satisfied. If so, it must then investigate whether any of the equitable exceptions set forth in section 26(1) of the Restatement (Second) of Judgments have been met. Justice Kilbride slammed the majority for failing to abide by its own standard of analysis:

After acknowledging these exceptions to the rule against claim-splitting, [referring to the Restatement (Second) of Judgments’ section 26(1) exceptions] this court then held in Rein that the exceptions should not be interpreted as immunizing plaintiffs against res judicata. In coming to this conclusion, Rein overlooked that a voluntary dismissal . . . without prejudice is [an exception] to the rule against claim-splitting . . . . Rein’s failure to apply the recognized exception has created untenable consequences.371

Justice Kilbride also referenced comment “b” to section 26(1), which clarifies the requirements behind the section 26(1)(b) exception:

[a] determination by the court that its judgment is ‘without prejudice’ . . . to a second action on the omitted part of the claim, expressed in the judgment itself, or in the findings of fact, conclusions of law, opinion, or similar record . . . should ordinarily be given effect in the second action.372

To both Justice Kilbride, and later Justice Fitzgerald, it was incomprehensible that the Rein and Hudson courts managed to avoid this critical exception with its statement that it did not believe that the voluntary dismissal and refiling statutes immunize a claim against a res judicata defense. Justice Kilbride also relied upon section 20(1)(b) of the Restatement (Second) of Judgments to further point out how voluntary dismissals are exempt from the application of res judicata. Under, section 20(1)(b), res judicata does not apply “[w]hen the plaintiff agrees to or elects a non-suit (or voluntary dismissal) without prejudice or the court directs that the plaintiff be non-suited (or that the action be otherwise dismissed) without prejudice . . . .”373 The comments to this section also clearly indicate that volun-

371. Id., 889 N.E.2d at 229.
373. Id. at § 20(1)(b).
tary dismissals operate as an exception to res judicata, and cannot be subjected to this defense. The dissent also cited section 20(1)(c) of the Restatement (Second) of Judgments, which states res judicata will not apply when "by statute or rule of court the judgment does not operate as a bar to another action on the same claim, or does not so operate unless the court specifies, and no such specification is made." Even though a final judgment was entered on count I of Hudson, the majority could not escape the essential fact that a statute entitled the invoking plaintiff to refile the claim and allowed that claim to survive. Justice Kilbride was greatly concerned that the majority was disregarding and an absolute procedural right granted to plaintiffs in general by the Illinois General Assembly.

While the triple identity test for res judicata was satisfied in Hudson, the dissent believed strongly that the majority had not done its homework with regards to its use of the section 26(1) exceptions and more specifically applying section 26(1)(b). The entire basis for this exception is found in the plain language of section 20 of the Restatement (Second) of Judgments that voluntary dismissals are non-prejudicial and an exception, both at common law and by the Code of Illinois Civil Procedure, to the application of res judicata. The majority could not have waded into a more profound intrusion upon the legislative sphere by asserting that its own policy considerations trumped an unambiguous legislative act.

Justice Kilbride authored a second attack on the Hudson majority’s reasoning by filing a written dissent upon the Illinois Supreme Court’s denial for rehearing. Essentially, Justice Kilbride agreed with the result in Rein but continued to stress that its analysis was flawed. Rein, he said, failed "to distinguish between two different factual situations for purposes of res judicata and the rule against improper claim-splitting." Using a voluntary dismissal to advance an appeal or to delay the adjudication of a particular theory until other theories are ruled upon constitutes claim-splitting. This was not the situation in Hudson.

374. Hudson, 889 N.E.2d at 228-29. See also Restatement (Second) of Judgments § 20 (1982) ("At common law the plaintiff is permitted to submit to a non-suit, which does not operate as a bar to action on the same claim, at any time before the jury has rendered its verdict or before the court, sitting without a jury, has announced its judgment.").
375. Hudson, 889 N.E.2d at 228-29.
376. Id. at 230. (quoting Restatement (Second) of Judgments § 20(c) (1982)).
377. Id. ("This court has repeatedly recognized that the express language of section 13-217 clearly 'grants a plaintiff the absolute right to refile a dismissed complaint . . . we may not infringe upon this statutory right to refile.'").
378. Id. at 231 (Kilbride, J., dissenting upon denial for rehearing).
379. Id.
380. Hudson, 889 N.E.2d at 231.
381. See id.
The second dissent again stressed that plaintiffs who invoke non-suits, as the plaintiff did in Hudson, are protected from res judicata by the non-prejudicial nature and statutory language governing voluntary dismissals.\(^{382}\) Such immunization was required by the adoptions from the Restatement (Second) of Judgments that the court had made in Rein. Reading section 26(1)(b) out of the claim-splitting analysis, and the assertion that the operative without prejudice language had no real meaning effectively undercut the legislative objectives of sections 2-1009 and 13-217.\(^{383}\)

In Hudson the Illinois Supreme Court placed its public policy prerogative above that of the General Assembly. Moreover, the court did so with the intent to expand the boundaries of res judicata. What began as a public policy concern over piecemeal appeals morphed into a near per se rule, that whenever a voluntary dismissal is taken after there has been at least one partial judgment on the merits, res judicata will automatically bar a later refiled action on the claim through the rule against claim-splitting. This expanded rule openly discarded the section 26(1)(b) exception adopted in Rein. Because of the Hudson’s court’s mixed signals on what it meant to reserve the right of the non-suiting plaintiff to refile, the appellate court was left to fill in the gaps. The appellate court, as we shall see, has done so inconsistently.

VII. POST-HUDSON APPELLATE RULINGS IN VOLUNTARY DISMISSAL-TYPE CLAIM-SPLITTING CASES

Since Hudson, the Illinois appellate courts have faced difficulty when considering whether the section 26(1)(b) exception protects an earlier partially adjudicated action whose remainder has been non-suited. This has led to divergent bodies of claim-splitting law.

\(^{382}\) Id. at 232 (quoting Semtek Intl., Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) (“The primary meaning of ‘dismissal without prejudice’, we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim. . . . Thus, Black’s Law Dictionary (7th ed. 1999) defines ‘dismissed without prejudice’ as ‘removed from the court’s docket in such a way that the plaintiff may refile the same suit on the same claim, and defines ‘dismissal without prejudice’ as [a] dismissal that does not bar the plaintiff from refiling the lawsuit within the applicable limitations period.”) (citation omitted)). Id.

\(^{383}\) Id. at 232-33 (arguing that the City of Chicago’s failure to object to the entering of a voluntary dismissal constituted acquiescence to refiling). Justice Kilbride felt that “[a]lthough the plaintiffs in both Rein and [Hudson] initially had a right to refile their voluntary dismissed claims under §26(1)(b) of the Restatement (Second) of Judgments, the plaintiffs in Rein abrogated their right by continuing to litigate their involuntarily dismissed count, thus improperly splitting their claims.” Id.
In *Doe v. Gleicher*, the plaintiff underwent in vitro fertilization (IVF) performed by the defendant, Doctor Norbert Gleicher of the Center for Human Reproduction. After her first IVF procedure resulted in failure, the plaintiff underwent successful implantation and later requested that any residual embryos from the procedure be ethically destroyed. The plaintiff later underwent a third IVF procedure but instead of asking that any residual embryos be destroyed, she requested that the defendants cryogenically freeze them. Some time later, during a news broadcast, Dr. Gleicher publicly disclosed the plaintiff’s name.

Consequently, the plaintiff filed a nine-count complaint, alleging among other theories, that the defendants had breached confidentiality as well as contractual and fiduciary duties. All of the counts except those alleging breach of contract, confidentiality, and fiduciary duties were dismissed by the trial court for failure to state a cause of action. The court granted the plaintiff leave to amend the breach of contract theory related to improper disposal of the embryos from the plaintiff’s second IVF procedure if facts supporting such a theory arose during discovery. The trial court also granted the plaintiffs’ leave to amend and consolidate the confidentiality claim into one alleging negligence and medical malpractice. The trial court refused the plaintiffs’ request for Rule 304(a) certification in the involuntary dismissal order. The plaintiff then filed a second amended complaint in compliance with the court’s terms and discovery was initiated between the parties. The plaintiff then invoked a voluntary non-suit. As in *Hudson*, no appeal was taken on the earlier, involuntarily dismissed counts.

385. *Id.* at 535.
386. *Id.*
387. *Id.*
388. *Id.* at 535-36.
389. *Id.* at 535-36. The first amended complaint set forth: (count 1) breach of contract; (count 2) breach of confidentiality; (count 3) breach of fiduciary duty; (count 4) res ipsa loquitur; (count 5) fraud; (count 6) invasion of privacy by public disclosure of private facts; (count 7); invasion of privacy by unreasonable intrusion upon the sec-
390. *Id.* at 536 (“Specifically, the trial court dismissed counts four through nine...
391. *Id.*
392. *Id.*
393. *Id.*
395. *Id.*
The plaintiff in *Gleicher* timely refilled the lawsuit pursuant to section 13-217.396 The counts in the refilled complaint, for the most part, mirrored the non-suited parent lawsuit.397 However, the plaintiff added a count for false light invasion of privacy and a count for negligent spoliation of evidence.398 These theories had not been pled in the earlier parent lawsuit. Pursuant to section 2-619, the defendants successfully moved for dismissal of the refilled lawsuit based on res judicata and an appeal followed.399

The First District appellate panel essentially turned *Gleicher* into a carbon copy of *Hudson*. It found that the earlier involuntarily dismissed counts constituted a final, but not immediately appealable, judgment on the merits under Rule 273.400 When the voluntary dismissal was taken, relying on *Dubina*, the court held that this final judgment became appealable.401 Further, because no appeal was taken, the voluntary dismissal effectively ended the case.402

Next, the court applied a more traditional claim-splitting analysis when it held that the false light and negligent spoliation of evidence claims were also barred by res judicata. The plaintiff argued that these two theories arose out of a separate set of facts from their other counts.403 The court found that basis for these theories arose out of the same nucleus of fact under the res judicata transactional identity analysis described in section 24 of the Restatement (Second) of Judgments and in *River Park, Inc.*404

396. *See id.*
397. *See id.*
398. *Id.*
399. *See Doe, 911 N.E.2d at 537.*
400. *Id.* at 538 (citing Deluan v. Treister, 708 N.E.2d 340 (Ill. 1990) ("The trial court’s December 19, 2002, order was an adjudication on the merits as to those six dismissed claims. . . . A dismissal pursuant to section 2-619 of the Code is an involuntary dismissal." (citation omitted)).
401. *Id.*
402. *Id.* at 539 (“No notice of appeal was filed within 30 days after the July 21, 2006, voluntary dismissal. The lawsuit was at an end.”).
403. *Id.* In some ways the decision to bar the plaintiff’s additional claims is within the spirit of the traditional claim-splitting dogma discussed earlier. *Id.* The traditional claim-splitting rule requires that a plaintiff must raise all known theories of relief in their first lawsuit or else they risk having waived them. *Id.* The application of the traditional claim-splitting rule to these additional counts is not perfect because earlier claims splitting cases tended to dispose of the entirety of a complaint. *Id.* In *Gleicher*, there were other counts remaining and some discovery had been taken. *Id.*
404. *Doe, 911 N.E.2d at 539-40.* The court stated, “Under the transactional test, separate claims will be considered the same cause of action for purposes of res judicata if they arise from a single group of operative facts, regardless of whether they assert different theories of relief.” *Id.* (quoting *River Park, Inc.* v. City of Highland Park, 703 N.E.2d 883, 893 (Ill. 1998). “Moreover, a final judgment will bar a plaintiff’s claim to all or any part of a transaction or series of connected transactions from which the action arose.” *Id.* (citing *River Park, 703 N.E.2d at 893*) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24, at 196
The *Gleicher* panel next delved into the equitable question of whether it was proper to apply res judicata. In what is perhaps the most controversial part of the court’s analysis, the panel simply stated that “[n]one of the equitable exceptions to claim-splitting applie[d].” In one very brief sentence, the appellate court made a superficial procedural comparison with *Hudson* and *Rein*. The *Gleicher* court, on *de novo* review, failed to address the fundamental question as to whether the section 26(1) equitable exceptions to claim splitting applied and found that the plaintiff in *Gleicher* had engaged in improper claim-splitting.

*Hudson* reared itself again as the foundation for the ruling in *Lane v. Kalcheim*. The structure of *Lane’s* overall fact pattern was very similar to that in *Hudson*. The *Lane* plaintiff originally had brought a legal malpractice action against his attorney, Kalcheim, who represented him in an earlier divorce proceeding. The plaintiff’s three count complaint alleged that: (1) Kalcheim, negligently failed to plead and prove the existence of an earlier oral settlement agreement between the former spouses, (2) failed to properly research the law and advise the plaintiff of the validity of an antenuptual agreement, and (3) that Kalcheim failed to properly prepare him to testify at a declaratory judgment hearing concerning the same antenuptual agreement.

Kalcheim moved for the dismissal of count I with prejudice asserting that it was barred by the statute of limitations. The defendant also moved for dismissal of counts II and III based on the unclean hands doctrine. The trial court granted dismissal of count I but denied the motion on counts II and III. Some two years later, the plaintiff voluntarily dismissed the lawsuit.

The *Lane* plaintiff timely refiled the lawsuit and combined the allegations that had been contained in counts II and III of the original action into

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(1982). A single group of operative facts is “to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.” *Id.*, 911 N.E.2d at 539 (citations omitted).

405. *Id.* at 541.


407. *Id.* at 95-96 (referring to *In re Marriage of Lane*, Docket No. 2-96-1453 (Ill. App. Ct. 1998) (unpublished pursuant to Illinois Supreme Court Rule 23)).

408. *Id.* at 96.

409. *Id.*

410. *Id.*

411. *Lane*, 915 N.E.2d at 96.

412. *Id.*
a new one count complaint.\textsuperscript{413} Kalcheim moved for dismissal of the refiled action based upon res judicata.\textsuperscript{414}

The first part of the Lane case dealt with whether the triple identity test for res judicata was satisfied. Unlike the plaintiff in Hudson, Lane argued that there was no identity between his causes of action. The appellate court disagreed. Relying, as it did in Gleich, upon the decision in River Park, \textit{Inc.}, the panel found that under the transactional analysis, the underlying divorce proceeding and the sub-dispute concerning the antenuptial agreement substantively and temporally arose out of a single core of operative facts.\textsuperscript{415} Therefore, there was an identity of the causes of action. Because the other two elements of the triple identity test, a final judgment on the merits by a court of competent jurisdiction and identity of the parties, were not contested, the appellate court found that res judicata applied between Lane’s parent and child lawsuits.\textsuperscript{416}

Next Justice Quinn addressed the fact that the Lane plaintiff had taken a voluntary non-suit. After concluding that the triple identity test for res judicata was satisfied, the court applied the rule from Hudson that a voluntary dismissal taken after a partial judgment on the merits constitutes improper claim-splitting.\textsuperscript{417} The panel simply stated that “[i]t also [found] that none of the exceptions to the rule against claim-splitting apply in this case.”\textsuperscript{418}

In Lane, the court took a substantial step in the evolution of Hudson-type claim-splitting jurisprudence. Lane represents the first instance, post-Rein, where the court was willing to directly address the section 26(1)(b) exception that was glossed over in earlier cases. However, the panel took the supreme court’s statement from Rein that the language of section 2-1009 did not immunize a refiled action from a res judicata defense to mean that the section 26(1)(b) exception did not apply period:

An argument could be made that because plaintiff voluntarily dismissed counts II and III of \textit{Lane I}, the trial court expressly reserved plaintiff’s right to maintain a second action and, therefore, this case falls under [the] second exception. However, in Rein, our supreme court held that although the express language of section 2-1009 of the Illinois Code of Civil Procedure appears to give plaintiffs the absolute right to refile voluntarily dismissed common law

\textsuperscript{413} Id. at 96-97.
\textsuperscript{414} Id. at 97.
\textsuperscript{415} Id. at 100-101.
\textsuperscript{416} Lane, 915 N.E.2d at 98, 101.
\textsuperscript{417} Id. at 101-02.
\textsuperscript{418} Id.
counts within one year after the voluntary dismissal or within the remaining period of limitations, this section should not be read to automatically immunize a plaintiff against the bar of res judicata when the voluntarily dismissed counts are refiled.419

Essentially, the Lane court read section 26(1)(b) out of the enumerated claim-splitting exceptions using Rein’s interpretation that a voluntary dismissal’s non-prejudicial nature is insufficient for res judicata purposes. Lane therefore implicitly confirms that Rein’s adoption of the section 26(1) exceptions were mere window dressing and, more specifically, that it was never intended for section 26(1)(b) to apply in any circumstance.420 If this is what was intended, it is worrisome that the court recognized early on that section 26(1)(b) would be the likely vehicle by which plaintiffs caught in a Rein/Hudson-type situation would rely upon to preserve their timely refiled claims. By holding that the “without prejudice” qualification expressed and implied in a voluntary dismissal does not protect a timely refiled action, ultimately, makes such a dismissal prejudicial. Through the judicial imperative, the plain language of section 2-1009 was nullified.

The section 26(1)(b) exception was also expressly cast aside in Cartwright v. Moore in which a trust beneficiary sought relief against the alleged improper behavior of the trustee.421 Cartwright had filed a two-count lawsuit charging that the defendant had breached his duty of loyalty and had wasted trust assets by failing to distribute them upon the trustor’s death per the terms of the trust.422

While this action was pending, Cartwright’s sister, Mohr, filed a separate two count complaint alleging that the defendant failed to distribute assets in violation of the trust’s terms and sought compensation and a mandatory injunction to force compliance.423 The second count alleged that the defendant did not exercise reasonable business competence when he failed to renegotiate a mortgage on one of the trust’s real properties.424 After the

419. Id. at 102 (citation omitted).
420. See id. (“Our supreme court reaffirmed that holding in Hudson, wherein the court stated that Rein ‘stands for the proposition that a plaintiff who splits his claims by voluntarily dismissing and refiling part of an action after a final judgment has been entered on another part of the case subjects himself to a res judicata defense. Because the dismissal of count I of plaintiff’s Lane I complaint was a final order, pursuant to the holding in Rein, no exceptions to the rule against claim-splitting apply here.’” (citation omitted)).
422. Id. at 1167.
423. Id.
424. Id.
Mohr lawsuit was filed, Cartwright intervened as co-plaintiff in that action.\textsuperscript{425}

The trial court entered judgment in the Mohr lawsuit, issuing the requested mandatory injunction, which directed the defendant to distribute trust assets.\textsuperscript{426} Count II of the Mohr complaint was then voluntarily dismissed without prejudice.\textsuperscript{427} The dismissal order also indicated that "the court retained jurisdiction to adjudicate 'the remainder of relief sought by the plaintiff' in Mohr.\textsuperscript{428}" This included a dispute between the parties over attorneys' fees.\textsuperscript{429} The trial court also granted Rule 304(a) certification.\textsuperscript{430}

The following month, the defendant complied with the mandatory injunction.\textsuperscript{431} Subsequently, the parties in the Mohr lawsuit came to an agreement over attorneys' fees.\textsuperscript{432} The settlement order, however, indicated that "the parties, including Cartwright, mutually released each other from any obligations arising from the Mohr suit 'but exclude[d] the claims asserted in Count II' . . . and exclude[d] 'any liabilities or claims arising out of or in connection with the [Cartwright] suit'.\textsuperscript{433}

Cartwright's suit continued to be litigated and the defendant asserted that res judicata barred this action based on the earlier Mohr adjudication.\textsuperscript{434} Judgment was entered in favor of Cartwright on her two counts.\textsuperscript{435} On appeal, the defendant trustee argued that the mandatory injunction judgment order in Mohr barred Cartwright's own lawsuit.\textsuperscript{436}

Justice Garcia began the appellate court's analysis by looking to see if the triple identity test for res judicata had been satisfied. It was undisputed that there was an identity between the parties.\textsuperscript{437} With regard to the identity of cause of action, Cartwright argued that the Mohr lawsuit was separate.\textsuperscript{438}

\begin{itemize}
  \item \textsuperscript{425} Id.
  \item \textsuperscript{426} Cartwright, 913 N.E.2d at 1167.
  \item \textsuperscript{427} Id.
  \item \textsuperscript{428} Id.
  \item \textsuperscript{429} Id.
  \item \textsuperscript{430} Id.
  \item \textsuperscript{431} Cartwright, 913 N.E.2d at 1167.
  \item \textsuperscript{432} Id.
  \item \textsuperscript{433} Id. at 1167-68.
  \item \textsuperscript{434} Id. at 1168.
  \item \textsuperscript{435} Id. The trial court awarded Cartwright a $1.9 million surcharge for the defendant trustee's failure to distribute stock per the trust's terms and an additional surcharge of $135,000.00 for the selling the deceased trustor's house below market value without the approval of the beneficiaries. Id.
  \item \textsuperscript{436} See Cartwright, 913 N.E.2d at 1167.
  \item \textsuperscript{437} Id. at 1169.
  \item \textsuperscript{438} Id. Cartwright's brief argued that "the damage claim [voluntarily dismissed] in Mohr related only to the damages arising out of the trustee's breach of fiduciary duty with respect to one specific asset in the trust, whereas the damages claim in the [Cartwright] case is based on the damages caused by the failure of the trustee to distribute all assets in the
\end{itemize}
However, the appellate court, using the transactional test from *River Park*,
concluded that both Cartwright’s and Mohr’s theories of recovery arose out
of the same nucleus of fact, which was the defendant trustee’s "mishandling
of the Alberding trust."439 Finally, Justice Garcia held that the final judg-
ment requirement of res judicata was satisfied, partially by Cartwright’s
own admission, because the *Mohr* injunction had forced the defendant to
distribute the stock at issue.440 This adjudication was a final judgment on
the merits of the *Mohr* action and touched upon the same request for relief
in the *Cartwright* action. Therefore, the appellate court found that res judi-
cata was triggered.441

Mohr would later voluntarily dismiss count II of her complaint.442 Taking
this into account, the *Cartwright* court ventured into dangerous terri-
ory by concluding that the voluntarily dismissed damages count in *Mohr*
triggered Rein-style claim-splitting from *Rein* and precluded Cartwright
from additional relief in her own lawsuit.443 Essentially, Cartwright could
not avoid the final judgment on the merits element of res judicata of Mohr’s
voluntary non-suit, even though Cartwright had not been involved with
Mohr’s count II.

In an unusual move, *Cartwright* vigorously expanded Rein/Hudson in-
to situations where a plaintiff intervenes in a pending action. The court said,

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440. *Id.* at 1170.

441. *Id.* In an interesting twist, Justice Garcia invoked the traditional rule against
claim-splitting by stating that Cartwright was obligated to have re-raised the issues, originally
pled in her own lawsuit, when she became a co-plaintiff in the *Mohr* lawsuit. *Id.* Justice
Garcia said, “Once Cartwright became a plaintiff in Mohr’s suit, res judicata compelled
Cartwright, no less so than Mohr herself, to litigate all her claims against trustee Moore in
that same suit. ‘Res judicata . . . require[es] parties to litigate in one case all claims arising
out of the same group of operative facts.’” *Id.* (citation omitted). This conclusion as applied
in this case is odd since Cartwright’s original lawsuit appeared to be still pending when
*Mohr* was adjudicated. See generally *Id.* Therefore, Cartwright’s theories were still before
the court, unlike the examples of omitted claims and theories from traditional claim-splitting
cases discussed earlier in this article. Justice Garcia noted in a footnote that the procedural
stance of Cartwright was complicated by the fact that the defendant trustee failed to file a
motion to dismiss the Cartwright action pursuant to 735 ILL. COMP. STAT. 5/2-619(a)(3)
(2011). See also *Cartwright*, 913 N.E.2d at 1171, n.1.

442. *Cartwright*, 913 N.E.2d at 1171. Mohr’s February 2005 voluntary dismissal of
count II was, when refiled in the circuit court, dismissed by Judge Burke on res judicata
grounds in November 2008. *Id.* Cartwright was not a party to that refiling or dismissal. *Id.* at
1174 (Gordon, J., dissenting).

443. *Id.*
[It discerned] no difference between a plaintiff attempting to split his claims into separate suits to be adjudged in succession, and an intervening plaintiff, proceeding to judgment on co-plaintiff's count of choice while voluntarily dismissing the remaining count, seeking to avoid the res judicata bar based on a claim that the settled suit left certain claims unresolved.\(^4\) It did not appear that the *Mohr* complaint sought compensation for the unauthorized sale of the trustee's real property. While the mandatory injunction adopted by *Mohr* and *Cartwright* adjudicated one of the issues also raised in Cartwright's separate lawsuit—being the stock distribution—the issue over the real property remained pending at the time of *Mohr's* adjudication. Using *Rein/Hudson*, the appellate court in effect treated the *Cartwright* action as a refiled section 13-217 lawsuit. Consequently, it nullified the remainder of Cartwright's pending suit because of the earlier partial adjudication in *Mohr*—a separate action only partially arising out of the same nucleus of fact. *Rein/Hudson* could now be applied to situations where a co-pending lawsuit in the absence of a defendant moving for section 2-619(a)(3) involuntary dismissal, is treated as a refiled child action to the voluntarily dismissed claim. *Cartwright* represents a wholly new species of voluntary dismissal-type claim-splitting. Unlike the fact patterns in *Rein* and *Hudson*, the dismissed *Cartwright* lawsuit had not even been subject to the voluntary dismissal and refiling statutes.

Having created this new monster, the appellate court moved to the question of whether any of the section 26(1) exceptions to the claim-splitting bar applied. First, Justice Garcia found that the acquiescence exception did not apply.\(^5\) The court correctly concluded that the dismissal language failed to indicate that the parties had agreed to stipulate to any refiling.\(^6\)

*Cartwright* argued that the controversial section 26(1)(b) exception also applied and that the court preserved her claims for later adjudication.\(^7\) Justice Garcia also rejected this proposition stating simply,

We reject as simply outside the bounds of reasonable interpretation of the record that trustee Moore, within a month after suffering defeat in the *Cartwright* litigation, would in a December 2006 order make for naught all of his efforts to bar the *Cartwright* litigation based on res judicata by the

\(^4\) *Id.* at 1170.
\(^5\) *Id.* at 1171.
\(^6\) *Id.*
\(^7\) *Cartwright*, 913 N.E.2d at 1171-72.
mere mention of the Cartwright suit in a release entered in
the Mohr suit. . . . We find no basis to conclude that the
December 2006 order judicially reserved Cartwright’s right
to maintain her separate litigation, which ended November
26, 2006, under the second exception listed in Rein.448

Two points must be made with regard to this statement. First, the
appellate court appears to have completely ignored the plain language of the
trial court’s dismissal order in the Mohr action. That order, as mentioned
earlier, indicated that the Cartwright lawsuit was excluded from the scope
of the settlement. There was no language that precluded further adjudica-
tion on the separate, pending Cartwright lawsuit. The operative effect of the
Mohr dismissal order’s language was to allow the remaining claims in the
Cartwright lawsuit to go forward. The Cartwright court was thus elevating
technical form over substance by barring Cartwright’s original suit based
upon the lack of positive language in the Mohr dismissal order.

Second, an argument could have been made that the section 26(1)(b)
exception did not apply because Cartwright’s lawsuit was not a refiled ac-
tion but instead was initiated prior to Mohr. Again, this demonstrated a
judicial creation of a wholly distinct subspecies of voluntary dismissal-type
claim-splitting. The section 26(1) exceptions to the rule against claim-
splitting anticipate that a claim is refiled from an earlier voluntary dismis-
sal. Such procedural disposition was wholly lacking in Cartwright.449

Having found that the triple identity test for res judicata was satisfied,
that there was improper claim-splitting present, and that none of the section
26(1) exceptions as adopted in Rein/Hudson were applicable, Justice Garcia
ruled that the surcharge judgments entered in the Cartwright lawsuit were
to be vacated.450

Justice Gordon filed a scathing dissent in Cartwright essentially es-
pousing Justice Kilbride’s Hudson position. He first looked at the language
of the Mohr dismissal order, noting that the “trial court granted Mohr’s oral
motion to dismiss without prejudice count II, the breach of fiduciary duty
claim for which damages were sought.”451 Justice Gordon also took note of
the order’s language excluding the Cartwright lawsuit from its operation.
He took this to mean that the parties had both agreed “plaintiffs [could]
split [their] claim by dismissing count II without prejudice and by specifi-

448. Id. at 1172 (citation omitted). The appellate court in Cartwright could not, nor
was it required to, address the question of whether this outcome would be different had the
Mohr dismissal order contained nunc pro tunc language. See id.
449. See id.
450. Id. at 1173.
451. Id. (Gordon, J. dissenting).
cally excluding it from the agreed settlement order . . . ."452 The plain language of the order should have satisfied the section 26(1)(a) exception.

Even if that were not the case and assuming that Mohr’s 2008 voluntary non-suit could impact Cartwright’s own action, Justice Gordon took a powerful stance that the voluntary dismissal, by itself, was non-prejudicial, and that this operative effect demonstrated that the trial court “expressly reserved plaintiff’s right to maintain [her claim in] the second action.”453 Justice Gordon also analyzed the procedural disposition from the alternative perspective that the Mohr non-suit, and its later dismissal upon refiling by Judge Burke, should not have had an impact on Cartwright’s pending action because Cartwright was not a party to Mohr’s timely refiled action.454 What cannot be discerned from Justice Gordon’s dissent is whether he would have applied this reasoning to the trial court’s dismissal of Mohr’s refiled count II in light of the language of the settlement order and similarities with Hudson.

Aside from representing an expansion of Rein/Hudson, we can see the appellate court in Cartwright making a strong push to avoid the application of the equitable exceptions to the rule against claim-splitting. Again, the section 26(1)(b) exception, which appears to have been given to the court, fits. Its clear language would appear to have preserved the earlier voluntarily dismissed claim from a res judicata defense as opposed to the Illinois Supreme Court’s steadfast adoption and implicit repudiation of them. It might be concluded that section 26(1)(b) was the unwanted orphan in Illinois claim-splitting law.

The procedural disposition in Kiefer v. Rust-Oleum Corp. was very similar, if not identical, to Hudson, Gleicher, and Lane.455 Kiefer originally filed a two-count lawsuit against Rust-Oleum in 2000, alleging both strict products liability and negligence (Kiefer I).456 The complaint was later amended to include U.S. Can Corp. as a defendant.457 The amended complaint in Kiefer I was reformed so that one count of strict products liability was asserted against each defendant.458 After the case was transferred to the Lake County Circuit Court on forum non-conviens, Rust-Oleum sought dismissal of the strict products liability count arguing that the law of British Columbia applied to the case, and that British Columbian law did not rec-

452. Cartwright, 913 N.E.2d at 1173 (Gordon, J. dissenting).
453. Id. (citation omitted).
454. Id. at 1174.
456. Id. at 23.
457. Id.
458. Id. at 23-24.
Recognize strict products liability as a cause of action.\(^{459}\) The involuntary dismissal was granted on this one count and Kiefer was granted leave to amend the complaint.\(^{460}\)

Three more amended complaints were filed by Kiefer alleging one count of negligence each against the defendants, Rust-Oleum and U.S. Can Corp.\(^{461}\) Three weeks prior to trial in Kiefer I, the plaintiff moved for a voluntary dismissal under section 2-1009.\(^{462}\)

Kiefer timely refiled the lawsuit, (Kiefer II), in the Circuit Court of Cook County’s Law Division under section 13-217.\(^{463}\) The plaintiff, once again, pled a single negligence count against both defendants.\(^{464}\) Rust-Oleum and U.S. Can Corp. filed motions to dismiss based upon res judicata.\(^{465}\) The trial court, after hearing and relying upon Hudson, granted the dismissal of the refiled action with prejudice.\(^{466}\)

The appellate panel, in mechanical fashion, applied the Rein framework in its affirmance of the trial court.\(^{467}\) First, the panel applied the res judicata triple identity test to the facts and found that all three elements had been satisfied.\(^{468}\) Specifically, the dismissal of the strict products liability count in Kiefer I against Rust-Oleum, based upon British Columbian law, constituted an adjudication on the merits under Rule 273, even though the other theories had yet to be heard.\(^{469}\) Because the plaintiff had invoked a voluntary non-suit after the involuntary dismissal, under Hudson and Rein, Kiefer had automatically engaged in claim-splitting.\(^{470}\)

Having concluded that res judicata applied and that claim-splitting was implicated, it was up to the appellate court to see if any of the equitable

\(^{459}\) Id. at 24. Rust-Oleum Corp.’s motion to dismiss was made pursuant to 735 ILL. COMP. STAT. 5/2-619(a)(9) (2011). Id.

\(^{460}\) Kiefer, 916 N.E.2d at 23-24.

\(^{461}\) Id. at 24-25.

\(^{462}\) Id. at 25.

\(^{463}\) Id.

\(^{464}\) Id.

\(^{465}\) Kiefer, 916 N.E.2d at 25.

\(^{466}\) Id.

\(^{467}\) Id.

\(^{468}\) Id. at 25-26. The Kiefer plaintiff did not challenge the identity of the parties or the identity of cause of action elements of the triple identity test. Instead the argument was over the earlier involuntary dismissal was a final judgment on the merits for purposes of res judicata. Id.

\(^{469}\) Id. at 26.

\(^{470}\) Kiefer, 916 N.E.2d at 28. (“The supreme court noted that Rein stands for the proposition that a plaintiff who splits his claims by voluntarily dismissing and refiling part of an action after a final judgment has been entered on another part of the case subjects himself to a res judicata defense. . . . Applying the holdings of Hudson and Rein to the facts in the case at bar, the conclusion that Kiefer’s negligence claims in Kiefer II are barred by res judicata become manifest.” (citation omitted)).
exceptions to claim-splitting applied. Strangely, in *Kiefer II*, the plaintiff failed to argue for the application of any of the section 26(1) equitable exceptions. As such, the argument was waived on appeal.\textsuperscript{471} The appellate panel, not having to deal with the equitable exceptions issue, quite easily dispatched the case on res judicata claim-splitting grounds by simply asserting that the Illinois Supreme Court had decided that none of the section 26(1) exceptions applied in *Rein* and *Hudson*.\textsuperscript{472}

While the appellate court has rigidly fought the application of the section 26(1)(b) exception, the opinion in *Quintas v. Asset Management Group, Inc.*,\textsuperscript{473} promises to shake the foundations upon which *Rein* and *Hudson* were built. In a startling ruling on procedural facts that mirrored *Hudson*'s, the appellate court held that a plaintiffs' refiled action survived a res judicata challenge based on section 26(1)(b) of the Restatement (Second) of Judgments.\textsuperscript{474}

The *Quintas* plaintiffs had brought a three-count action against Asset, AMG Guaranty Trust, and Linda Weinrib alleging negligence, breach of fiduciary duty, and breach of the Illinois Consumer Fraud and Deceptive Business Practices Act.\textsuperscript{475} The plaintiffs had a large percentage of their assets invested with Lucent Technologies, the employer of Jim Quintas.\textsuperscript{476} In 2000, those assets were worth about \$2 million.\textsuperscript{477} Weinrib allegedly recommended that the plaintiffs maintain half of their assets invested with Lucent after Jim Quintas retired.\textsuperscript{478} After his retirement, Lucent stock lost eighty percent of its value.\textsuperscript{479}

The defendants filed motions for summary judgment arguing that no fiduciary relationship existed, that plaintiffs could not point to any specific examples of unfair or deceptive practices, and lastly, that plaintiffs did not rely upon any of the defendants’ advice nor was any such advice the proximate cause for plaintiffs’ damages.\textsuperscript{480} The trial court agreed with the defendants in part, granting summary judgment on the breach of fiduciary duty and consumer fraud counts.\textsuperscript{481} Summary judgment was denied on the negligence count and the circuit court set an October 25, 2004 trial date.\textsuperscript{482}

\textsuperscript{471} Id. at n.2.
\textsuperscript{472} Id. at 29.
\textsuperscript{473} *Quintas v. Asset Mgmt. Group, Inc.*, 917 N.E.2d 100 (Ill. App. Ct. 2009).
\textsuperscript{474} Id. at 106.
\textsuperscript{475} Id. at 101. See 815 ILL. COMP. STAT. 505/1 (2009).
\textsuperscript{476} *Quintas*, 917 N.E.2d at 102.
\textsuperscript{477} Id.
\textsuperscript{478} Id.
\textsuperscript{479} Id.
\textsuperscript{480} Id.
\textsuperscript{481} *Quintas*, 917 N.E.2d at 102.
\textsuperscript{482} Id.
Four days prior to trial, the plaintiffs filed an emergency motion for voluntary dismissal without prejudice.\(^\text{483}\) The court granted an agreed order for voluntary non-suit but required the plaintiffs to pay defendants' costs for the litigation, and the court retained jurisdiction to decide any subsequent issues concerning Illinois Supreme Court Rule 219.\(^\text{484}\) For reasons unexplained, the plaintiffs again presented their motion for voluntary dismissal to the court on the trial date. At that time, plaintiffs' counsel indicated that the case would be refiled.\(^\text{485}\) The court again entered an order "granting voluntary dismissal subject to certain conditions."\(^\text{486}\) The trial judge also wrote, "VOLUNTARY DISMISSAL WITH LEAVE TO REFILE ALLOWED" on the case's docket sheet.\(^\text{487}\) Ten days after this order was entered, the defendants spindled a motion seeking costs and reasonable expenses for the earlier litigation pursuant to Rule 219(e).\(^\text{488}\) This motion was heard on February 15, 2005, and continued until April 18, 2005, "based upon plaintiffs' representation that the case would be refiled."\(^\text{489}\) Yet, prior to hearing on this motion, the plaintiffs refiled their negligence count.\(^\text{490}\) In May of 2005, an order was entered awarding defendants $16,197.18 as sanctions under Rule 219(e).\(^\text{491}\) In November 2005, the defendants filed an affirmative defense that the refiled action was barred under res judicata followed by a motion for summary judgment on the same theory.\(^\text{492}\) Summary judgment based on res judicata was later granted.\(^\text{493}\) The plaintiffs asked the trial court to reconsider its ruling and further asked

\(^{483}\) Id.

\(^{484}\) Id.

\(^{485}\) Id.

\(^{486}\) Quintas, 917 N.E.2d at 102.

\(^{487}\) See id.

\(^{488}\) Id. at 102-03. Illinois Supreme Court Rule 219(e) states:

A party shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit. In establishing discovery deadlines and ruling on permissible discovery and testimony, the court shall consider discovery undertaken (or the absence of same), any misconduct, and orders entered in prior litigation involving a party. The court may, in addition to the assessment of costs, require the party voluntarily dismissing a claim to pay an opposing party or parties reasonable expenses incurred in defending the action including but not limited to discovery expenses, expert witness fees, reproduction costs, travel expenses, postage, and phone charges.

ILL. S.CT. R. 219(e) (West 2005).

\(^{489}\) Quintas, 917 N.E.2d at 103.

\(^{490}\) Id.

\(^{491}\) See id.

\(^{492}\) Id.

\(^{493}\) Id.
that reconsideration be stayed until the *Hudson* decision had been issued.494

After *Hudson*, the trial court refused the *Quintas*’ request.495

On appeal, the *Quintas* plaintiffs argued that the trial court had expressly reserved the right to refile the negligence claim when the voluntary dismissal order was entered, and that the defendants had acquiesced to the refiled action “by withholding objection, [by] allowing both cases to exist simultaneously, and [by] using the refiled action to their benefit.”496 The defendants argued that there was “no express language in the dismissal order reserving plaintiffs’ right to refile.”497 The defendants also argued they had not acquiesced to the refileing.498

Justice Gallagher began his analysis recognizing that by agreement of the parties, the triple identity test for res judicata had been satisfied.499 Next he noted that the Illinois Supreme Court had adopted the six equitable exceptions to claim-splitting from section 26(1) of the Restatement (Second) of Judgments.500 Most notable of these were section 26(1)(a-b), the two sections raised by the plaintiffs on appeal.

In a salvo aimed at *Hudson* and *Rein*, the court found that the trial court’s order and docket entry satisfied the section 26(1)(b) exception to claim-splitting. The voluntary dismissal order had indicated that the dismissal was “without prejudice.”501 However, this order apparently did not contain any language indicating leave to refile.502 Yet, the docket entry *did* indicate that the voluntary non-suit was made with leave to refile.503 The defendants had argued that the order of dismissal and the docket entry were contradictory and that the order trumped the docket entry.504 Instead, the appellate panel found that that the dismissal order was “merely silent on the issue of refiling.”505 “Moreover, because the words ‘without prejudice’ in the order imply that the case could be refiled, the language in the docket sheet entry [was] in fact consistent with the order.”506 Additionally, the

494. *Quintas*, 917 N.E.2d at 102.
495. *Id.*
496. *Id.* at 104. For purposes of this article, only the *Quintas* plaintiffs’ section 26(1)(b) argument will be discussed. The appellate court disagreed with the *Quintas* plaintiffs’ acquiescence arguments, but since the section 26(1)(b) exception had been satisfied, the refiled claim was protected from the application of res judicata. *See id.* at 109-10.
497. *Id.* at 104.
498. *Id.*
499. *Quintas*, 917 N.E.2d at 104.
500. *See id.* (citing *Hudson*, 889 N.E.2d at 216).
501. *Id.*
502. *Id.*
503. *Id.* at 104-05.
505. *Id.*
506. *Id.*
court referenced Black’s Law Dictionary to define “express” for purposes of section 26(1)(b) as “‘[c]learly and unmistakably communicated; directly stated.’ The docket sheet entry clearly and directly state[d] that a voluntary dismissal with leave to refile was allowed.” Justice Gallagher concluded that the docket entry and voluntary dismissal order “clearly and unmistakably grant[ed] leave to refile; thus, the exception applie[d] and the plaintiffs’ suit [was] not barred by res judicata.”

After Quintas, there was a conflict between that case and the supreme court’s holding in Rein and Hudson (and its appellate progeny of Gleicher, Lane, Cartwright and Keifer). Under the holding in Quintas, a voluntary dismissal order—or in combination with a docket sheet—indicating that a non-suit was taken without prejudice and with leave to refile breathes life into Justice Kilbride’s dissenting position that a voluntary dismissal immunizes a non-suited, refiled claim against res judicata. Quintas is extremely important because procedurally the case is identical to Hudson where it was held that none of the section 26(1) equitable exceptions applied. More specifically, Justice Gallagher’s analysis of the language of the non-suit orders and docket sheet is irreconcilable with the Hudson majority’s pronouncement that the requisite “without prejudice” language is not alone sufficient to stave off a res judicata/claim-splitting attack. With this conflict, res judicata law as it relates to Hudson-type situations has now become uncertain. This intra-appellate conflict sets the Illinois Supreme Court up to the task of finally deciding when, how, and even if section 26(1)(b) is either substantively viable or meaningless window-dressing.

The acceptance of section 26(1)(b) in Quintas failed to carry over to the decision in Matejczyk v. City of Chicago. The plaintiff originally filed a negligence action against the city of Chicago for injuries sustained when he allegedly tripped and fell over a hole in a sidewalk leftover from a long since removed traffic signal. He alleged that the city negligently failed to fill the hole, failed to post warning signs, and failed to erect a barricade. Matejczyk then filed an amended complaint that split his theories into two counts. The factual allegations remained the same, but the counts differed

507. Id. at 107 (citing BLACK’S LAW DICTIONARY 620 (8th ed. 2004)).
508. Id.
509. See supra Part V.
510. The language at issue in the Quintas dismissal orders and docket entry are also found within the plain language of sections 2-1009 and 13-217 of the code of civil procedure. The case failed to discuss as to whether, as a matter of statutory construction, the language of these statutes alone protects a refiled claim from res judicata after voluntary dismissal.
512. Id. at 27.
513. Id.
514. Id.
as to the approximate date that the traffic signal had been removed. The city moved for involuntary dismissal, successfully arguing that it was immune from the duty to warn and barricade allegations of count I, and that count II was barred entirely based on a ten-year statute of limitations. The circuit court dismissed two of the three allegations in count I and dismissed count II. This left one remaining theory pending in count I. The circuit court also granted the plaintiff leave to file an amended count II and appeal was made on the dismissals.

The plaintiff then filed an amended one-count complaint alleging the same theories but changing the date that the signal was removed. The day after this amended complaint was filed, the plaintiff voluntarily dismissed the case “without prejudice.” Twelve days after the non-suit, the plaintiff refiled the one-count version and indicated in the complaint that the new case was the refiled child of the voluntarily dismissed action. Subsequently, the city moved for involuntary dismissal based upon res judicata, and the circuit court granted the motion based upon Hudson.

Over Matejczyk’s argument that there had not been a final judgment on the merits of the voluntarily dismissed count, Justice Garcia agreed with the trial judge that the triple identity test for res judicata had been satisfied. Under Rule 273, the involuntary dismissal of the original count II acted as an adjudication upon the merits and was a final judgment for purposes of res judicata.

Justice Garcia next applied the rules from Rein and Hudson to the procedurally identical facts of the case at bar. With a partial adjudication already made, Matejczyk elected to voluntarily non-suit the claim instead of proceeding to trial. Therefore, the voluntary dismissal brought the case into the realm of claim-splitting. The next step for the court, reviewing de novo, was to ascertain whether the section 26(1) exceptions applied.

515. Id. (“[C]ount I alleged that the signal was removed ‘[s]ometime after 1996,’ [while] count II alleged that the signal was removed on February 8, 1985.”).
516. Matejczyk, 922 N.E.2d at 27.
517. Id.
518. Id. This second amended complaint alleged that the signal was removed “prior to November 26, 2005.” Id.
519. Id. The dismissal order was “styled [as] an ‘agreed order.’” Id.
520. Id.
521. Matejczyk, 922 N.E.2d at 27.
522. Id. at 31 (quoting Rein, 665 N.E.2d 1199, 1205). Justice Garcia openly admitted that the trial court’s dismissal of count II “did not dispose of the whole case; in fact, count I was unaffected except for Judge Lawrence’s ruling that certain allegations were barred . . . .” Id. at 30. Once again this seems to conflict with the basic definition of what constitutes a final judgment on the merits, where a case is disposed of entirely.
523. Id. at 33 (“To allow the voluntary dismissal of the remaining viable counts, with the right to refile, would by definition promote piecemeal litigation. Such a result is contrary to the policy consideration of promoting finality embedded in res judicata. In other words, a
As he had in *Cartwright*, Justice Garcia found that none of the section 26(1) exceptions applied to prevent the application of the rule against claim-splitting. The plaintiff argued that the circuit court had reserved the right to refile. In an important paragraph, Justice Garcia found that “[t]here [was] no indication in the record that the dismissal order was written with an exception to claim-splitting in mind.”\(^{524}\) The voluntary dismissal order “contained no language granting Matejczyk the right to file a subsequent suit seeking identical relief despite the general prohibition against claim-splitting.”\(^{525}\) Even though the dismissal order indicated that it was taken without prejudice, such language did not comport with *Hudson’s* holding that the language of section 2-1009 was insufficient to protect the voluntarily non-suited claim. Therefore, none of the equitable exceptions could rescue the refilled lawsuit.\(^{526}\)

Justice Garcia gave clues as to how the section 26(1)(b) exception might be applied when he said “the exception clearly applies only where the circuit court *expressly* reserves the plaintiff’s right to refile.”\(^{527}\) We can begin to see the issue over section 26(1)(b) morphing into a case of technical form over substance, precisely the legal maxim that courts tend to abhor. The court in *Hudson* found the language of sections 2-1009 and 13-217 insufficient to protect the refilled claim from a res judicata defense even though the statutes include in tandem the necessary saving language. It makes little practical sense that a voluntarily dismissing plaintiff could lose the benefit conferred by statutory language by failing to include such language in a dismissal order. Further, based on *Hudson* and the other appellate cases, there is no certainty that even if such language were included in a voluntary dismissal order that it would be recognized as satisfying section 26(1)(b). While the overwhelming majority of post-*Hudson* cases have bluntly declined to apply this exception, there appears to be disagreement over its viability. Ultimately, the Illinois Supreme Court will likely be

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\(^{524}\) Id.

\(^{525}\) Id. at 34.

\(^{526}\) Matejczyk argued that the city had acquiesced to the refiling because the dismissal order was titled “agreed order.” Id. The appellate panel did not feel that the language of the order indicated that the city had agreed to such a condition nor was the title, “agreed order” dispositive as it was mere form over substance. Id. at 32. Matejczyk also argued that the holding in *Piagentini* applied to save the refilled claim. The panel distinguished that decision from the case at bar, noting that the involuntary dismissal, unlike *Piagentini*, “did not leave ‘both counts . . . standing as bases for recovery.’” Id. at 35.

\(^{527}\) Id.
called upon to revisit *Hudson* and either affirm its broad scope or whether revisions are called for.

In several recent cases, the appellate court in the First District appears to have shifted its favor toward the *Quintas* side of the spectrum while exhibiting restrained hostility toward *Hudson*. First, in *Estate of Green v. Northwest Community Hospital*,\(^\text{528}\) William Green, acting as special administrator, brought a multiple count complaint alleging negligence; wrongful death; survival, funeral and burial expenses; and spoliation of evidence in relation to the medical care and subsequent death of his wife.\(^\text{529}\) The Circuit Court of Cook County entered summary judgment for the defendants on counts V through VII of the third amended complaint.\(^\text{530}\) The counts alleged wrongful death, loss of consortium, and survival.\(^\text{531}\) Over a year later, summary judgment was entered for the defendants on counts IX and X of the fifth amended complaint.\(^\text{532}\) These counts were for intentional infliction of emotional distress and spoliation of evidence.\(^\text{533}\) The plaintiff later moved for a voluntary dismissal, which was granted over the defendants’ objection.\(^\text{534}\) The trial court’s order indicated that “[t]he plaintiff is granted leave to voluntarily dismiss with leave to reinstate as a matter of right.”\(^\text{535}\) The plaintiff timely filed a ten-count complaint alleging many of the same theories that had been dismissed on summary judgment in the parent lawsuit.\(^\text{536}\) The defendant successfully dismissed Green’s wrongful death, survival, loss of consortium, consumer fraud, and healthcare fraud counts using the res judicata doctrine.\(^\text{537}\) The central issues on appeal were whether res judicata and the rule against claim-splitting acted to bar the refilled lawsuit and whether the trial court’s dismissal on those grounds was overly broad in scope.

After reciting the general fact pattern and holding from *Hudson*, Justice Steele held that the dismissal order’s reinstatement language satisfied the section 26(1)(b) exception even though *Green’s* procedural disposition was identical to that of *Hudson*. The specific language used by the trial court brought *Green* closer to the holding in *Quintas* than the previous post-*Hudson* appellate decisions.\(^\text{538}\) The defendant unsuccessfully attempted to

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529. *Id.* at 553.
530. *Id.*
531. *Id.*
532. *Id.*
534. *Id.*
535. *Id.*
536. *Id.*
537. *Id.*
counter by arguing that the language in the order was not specific enough to trigger the exception.\textsuperscript{539}

After determining that section 26(1)(b) was triggered and affirming the holding in \textit{Quintas}, the appellate panel had to determine the scope of its ruling. The question of whether Green was allowed to refile those theories already adjudicated in the parent lawsuit was answered in the negative.\textsuperscript{540} The claims that had been pending at the time of the earlier non-suit were preserved for adjudication. However, the earlier adjudicated theories could not be resurrected.

If \textit{Quintas} was a fissure, \textit{Green} was a canyon-forming wedge within the First Appellate District. These cases illustrate Justice Kilbride’s concerns that \textit{Rein} and \textit{Hudson} are not workable adjudicatory models. \textit{Quintas} and \textit{Green} could best be described as a clear break from \textit{Hudson}. Under these two cases, a straight comparison between \textit{Hudson}’s procedural disposition and that of the case at bar was insufficient to trigger the res judicata bar, even though such a direct analysis had been enough in other cases. \textit{Green} demonstrates the important role that language plays in the voluntary dismissal-type claim-splitting situations. Whereas in \textit{Quintas} the appellate court had to scrutinize both a dismissal order and a docket sheet, \textit{Green} elevated section 26(1)(b) to a new level where the court only had to analyze the plain language of the dismissal order itself. The \textit{Green} court was not left with scattered pieces.

At the end of October, 2010, the First Appellate District voiced perhaps its strongest disapproval of \textit{Hudson} with its ruling in \textit{Severino v. Freedom Woods, Inc.}\textsuperscript{541} The panel reluctantly accepted \textit{Hudson}’s majority opinion but in a dramatic shift, indicated that it would apply the section 26(1)(b) exception to avoid it.

The \textit{Severino} plaintiff, injured in a horse riding accident at the defendant’s property, originally brought a two-count action alleging liability under the Animal Control Act\textsuperscript{542} and common law negligence.\textsuperscript{543} The Animal Control Act count was dismissed with prejudice as the plaintiff was found not to be a member of the statute’s protected class.\textsuperscript{544} The trial court also struck the negligence count but granted the plaintiff leave to file an

\textsuperscript{539} See \textit{id.} The Estate of Green defendant cited to \textit{United States v. Outboard Marine Corp.}, 789 F.2d 497, 501-02 (7th Cir. 1986), in support of its position.

\textsuperscript{540} See \textit{Estate of Green}, 928 N.E.2d at 555.


\textsuperscript{542} See \textit{510 ILL. COMP. STAT. 5/1} (West 2002).

\textsuperscript{543} \textit{Severino}, 2010 WL 4967842, at *2.

\textsuperscript{544} \textit{Id.} at *3.
amended complaint. Subsequently, the plaintiff filed an amended one-count negligence action.

After refilling, the defendant attempted to knock out the amended complaint arguing that the statute of limitations for negligence had passed. The trial court disagreed, finding that the relation back doctrine preserved the amended negligence claim. The dismissal motion was denied. Some two years after the amended complaint was filed, the plaintiff moved for a voluntary dismissal. The court’s order stated that the voluntary dismissal was granted “without prejudice and costs to any party,” as well as “costs to be paid upon the refilling of the complaint by plaintiff.”

When Severino refilled the negligence action, the defendant raised the specter of Rein and Hudson in its motion for dismissal.

The Severino defendant took a very straightforward approach to its argument, namely that the dismissal with prejudice of the Animal Control Act count in the original action operated as a final judgment on the merits. Under Hudson, the refiling of the action would be claim-splitting per se because of the earlier entered involuntary dismissal. The trial court found this line of reasoning substantially persuasive and granted the dismissal. The plaintiff appealed, stressing that either res judicata as applied in Rein and Hudson could not apply as there was no final judgment on the merits; or, that if Hudson did apply, section 26(1)(b) applied to preserve the refilled action.

Justice Smith took the opportunity accorded by Severino to openly condemn Hudson’s majority holding while at the same time begrudgingly agreeing with the defendant’s position that the case’s procedural disposition was no different than that of Hudson. Justice Smith noted that under Hud-

545. Id.
546. Id.
547. Id.
549. Id.
550. Id. After the voluntary dismissal was entered, the Severino defendant filed a notice of appeal arguing that the trial court erred in denying the earlier motion to dismiss. The plaintiff in Severino I countered by arguing that the appellate court lacked jurisdiction to hear the appeal and that a denial of a motion for involuntary dismissal was not a final and appealable judgment order. See id. at *4. The defendant’s appeal in Severino I was subsequently dismissed for lack of jurisdiction. Id.
551. Id.
552. Id.
553. See Severino, 2010 WL 4967842, at *5. (“The trial court noted that defendant’s argument was that the order granting dismissal of the Animal Control Act in the original action was a final judgment on the merits and precludes plaintiff from relitigating the second refilled action.”).
554. Id. at *7.
555. Id.
son and Dubina, the prejudicial dismissal of the Animal Control Act count was an adjudication on the merits for res judicata and that the later voluntary dismissal ended the action and made all previously entered judgment orders final and appealable. To this end, the defendant was correct in its legal argument. Justice Smith’s swipe at Hudson and its underlying reasoning is shockingly noteworthy: “After a close reading of Rein, we find the Hudson dissent to be more persuasive than the majority opinion. However we are aware that we are bound by the supreme court’s majority opinion and therefore find the defendant to be correct . . . .” Halfway through the Severino opinion, it appeared that the defendant might have prevailed on appeal.

However, while deferring to the basic framework set forth in Hudson’s majority, Justice Smith moved the case toward Quintas. Under Quintas’ holding, the Severino plaintiff would have needed to incorporate some form of saving language into his voluntary dismissal order to trigger the section 26(1)(b) exception. The panel, considering Quintas and looking at the earlier two phrases used by the Severino plaintiff in his dismissal order, concluded that in tandem, the order indicated a non-prejudicial dismissal and the intent to refile. Further, Severino’s docket sheet indicated “Voluntary Dismissal W[ith] Leave To Refile-Allowed.” Because this language was identical to that on the Quintas docket sheet, the Severino court found that all of these indications taken together indicated intent by the trial court to reserve the plaintiff’s right to refile the action pursuant to section 26(1)(b).

The line of voluntary dismissal-type claim-splitting cases coming from the First Appellate District makes poignantly clear that Hudson is viewed in a negative light. This displeasure centers upon the Hudson majority’s failure to provide a clear reason why the section 26(1)(b) exception could not be applied. Judicial hierarchy demands that Hudson be followed, but the unrest within the First District indicates an attempt to erode it. Justice Smith cleverly played both sides of Hudson, openly agreeing with Justice Kilbridge’s approach, while accepting that the appellate court was not allowed to follow it. Yet, what the appellate court could do was apply Quintas, giving effect to the section 26(1) exceptions that were adopted in Rein yet not applied in Hudson. In this manner, the Rein/Hudson framework would not be violated, but simply the unexplained gap for the framework’s second prong would be filled, in as cases moved through the dockets. The lesson is

556. Id. at *9.
557. Id.
559. Id. at *10.
560. Id.
561. See id. (relying on and incorporating language from Quintas).
this: the appellate court has provided some powerful clues as to how parties to litigation might preserve their claims in *Hudson*-type situations. As we shall see, the tipoff requires a very technical task, the use of copying the saving language found in sections 2-1009 and 13-217 into a voluntary dismissal order.

A fundamental problem remains with the post-*Hudson* line of cases. The appellate courts in some situations disregard the plain language of sections 2-1009 and 13-217 when invoked, because the *Hudson* court held that “without prejudice” language cannot counter the claim-splitting exceptions. With this in mind, the appellate courts might appear to be inclined to take a strong *Hudson*-type stance in cases where detailed refiling language is absent from a voluntary dismissal order. However, when such detailed language is utilized in a court order, section 26(1)(b) appears to apply depending on phraseology. The exact form and quanta of language that a nonsuiting plaintiff must use to trigger the exception remains flexible and subject to a case-by-case interpretation so long as some iteration of reinstatement or refilling is mentioned.

We have seen that the rule against claim-splitting is highly malleable and has undergone expansion and contraction over the past century and a half. From its beginnings as a means of preventing a losing plaintiff from bringing a new lawsuit based on new theories, we have seen the creation of new germ lines of jurisprudence. Some of these might be categorized as evolutionary dead-ends and narrow exceptions. One comprises an even greater expansion of the extreme measure of barring an action when a plaintiff invokes a statutory right, first in order to appeal in a piecemeal fashion, followed by further growth for situations where an appeal is absent. One thing is certain: in deciding to expand its power, the Illinois judiciary has touched off a separation of powers debate while creating inconsistent case law. In the interest of overall fairness to litigants and in the interest of creating a more uniform body of case law, Illinois requires a claim-splitting fix.

**VIII. SOLUTIONS**

In his Illinois State Bar Journal article, Ross Edwards generally suggested that the General Assembly should amend section 2-1009 to shield the right of voluntary dismissal from *Hudson’s* ruling.562 Building upon Mr. Edwards’ suggestion, this article proposes several forms of amendments.

First, the General Assembly might further limit the time frame as to when a voluntary dismissal may be taken. As it stands now, section 2-1009 allows for voluntary dismissal as of right at any time prior to hearing or

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trial. A possible amendment might shorten this period by disallowing an absolute right to non-suit after there has been a partial adjudication on the merits of the case. An amended section 2-1009(a) might therefore read:

The plaintiff, may, at any time before trial or hearing begins, or before entry of an adjudication on the merits of part of the cause, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.

This kind of amendment would effectively eliminate the use of the voluntary dismissal to "split" a claim. Under this amended section 2-1009, a party would be forced to move the case forward and finish litigating all of its claims before engaging in the appellate process. A drawback might be that a plaintiff who is faced with unusual circumstances, such as the death of an attorney or the disappearance of the plaintiff, might be forced to bear the circumstances of not being prepared to move forward on their case due to circumstances beyond counsel's control.

Another option might be to codify Rein's public policy concerns by adding a sub-provision to section 2-1009 expressly stating that if a plaintiff files a notice of appeal pursuant to Illinois Supreme Court Rule 303 within thirty days of taking a voluntary dismissal of their partially adjudicated case, the right to refile the cause within one year of the non-suit under section 13-217 would be forfeited.563 (See Figure Three).

If a plaintiff desires to refile their non-adjudicated counts after a voluntary dismissal, they must forego their right to appeal the adjudicated counts, because of Rule 303's thirty day post-judgment time period for filing a notice of appeal, and simply refile the remaining claims within the requirements of section 13-217. Further, if a plaintiff refiles the remaining un-adjudicated claims, they must be identical to the voluntarily dismissed parent claims. The addition of new theories arising out of the same nucleus of fact would comprise the more traditional form of improper claim-splitting.

While this patchwork might not be a perfect solution, such amendments would effectively shunt a plaintiff's use of the voluntary dismissal as a means to engage in piecemeal litigation and appeals. A plaintiff would be

563. See infra Figure Three. Illinois Supreme Court Rule 303(a)(1) states in part, "[t]he notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed, whether in a jury or a nonjury case, within 30 days after entry of the order disposing of the last pending post-judgment motion." Ill. S.Ct. R. 303(a) (West 2005).
faced with two choices. If they felt that the adjudicated theories are stronger than the remaining counts, it would be a better strategy to move forward with an appeal under Rules 301 and 303. If the adjudicated counts were the weaker of the claims, then it would make more sense to simply move forward with their remaining theories by refiling under section 13-217.

These changes address the Hudson court’s concerns about the potential evisceration of Rule 304(a) certification. Of course, if the trial court grants a plaintiff this certification, claim-splitting concerns no longer becomes an issue. However, under the above proposals, the denial of Rule 304(a) certification, by itself, would not be objective indicia of a plaintiff seeking to engage in procedural abuse. The proposed modifications place the emphasis on a plaintiff’s litigation conduct (the act of filing or not filing an appeal) after the entry of a voluntary dismissal.

These proposals still present plaintiffs with a choice. If they choose to stand on their right to voluntarily dismiss, they should be protected from a res judicata defense based upon the non-prejudicial nature of the dismissal. This route allows a plaintiff to have a full day in the trial court if they feel that their theory of recovery is stronger than their previously adjudicated counts. A plaintiff would therefore be forced to evaluate their evidence as to whether they could carry their burden of proof as to either the adjudicated counts or the voluntarily dismissed ones. In the end, it becomes a matter of thorough case evaluation, identifying the strongest and most plausible theories of recovery, and the exercise of prudent litigation strategy.

The waiving of the appellate right for a partial adjudication in favor of refiling voluntarily dismissed claims also addresses the defense’s concerns that their clients will be threatened with endless and repetitive litigation. Since a defendant will be aware if a plaintiff elects not to proceed with an appeal, they will likewise not have to engage in the time, effort, and expenses involved with prosecuting such an appeal. Further, this proposal continues to force a plaintiff to litigate the remainder of their claims as they were set forth in the original complaint. Defendants would suffer minimal prejudice because they will already have been put on notice of precisely what the nature of the refiled cause of action. The traditional rule against claim-splitting could still be utilized as a means to dismiss a refiled action under section 2-619(a)(4), if the plaintiff files previously omitted new theories of recovery, which could have been raised in the original lawsuit and arise out of the same nucleus of fact.

Hypothetically, if discovery had been ongoing prior to the entry of a voluntary dismissal, a defendant would have much information about the opposing side’s case already in hand; and the need for additional discovery

564. 735 ILL. COMP. STAT. 5/2-619(a)(4) (West 2005).
should, in theory, be less. Upon refiling, a trial court may also take judicial notice of any court filings from the earlier lawsuit and has the discretion to impose monetary sanctions on a plaintiff if deemed necessary. It should not be the case that every refiled action under sections 2-1009 and 13-217 need to be re-litigated from scratch if prior discovery has flushed out a substantial amount of information. Defendants, who choose to engage in this re-litigation strategy by serving and utilizing repetitive interrogatories, production requests, and other discovery tools, may also be contributing to the further clogging of the court’s dockets. The above proposals do not infringe the constitutional power of the supreme court to regulate Illinois’ judicial system, but instead, forces litigants into specific behavioral tracks designed to keep cases moving forward through the docket.

Of equal importance would be for the Illinois Supreme Court to amend Rule 273. In Rein, it was clear that the court was troubled by the plaintiffs’ use of a non-suit to accelerate a piecemeal appeal to the extent that they shoehorned that case into the claim-splitting doctrine. This article proposes that Rule 273 be amended to incorporate Rein’s holding against appealing partial adjudications on the merits of a case while other parts of the same case remain pending. Additionally, an amended Rule 273 should also reflect that a plaintiff cannot voluntarily dismiss a portion of their case, take the remainder to final judgment, and then refile the earlier non-suited portion. To enhance clarity and to avoid potential separation of powers conflicts, either the Illinois Supreme Court should take the lead and amend Rule 273 to incorporate Rein’s narrow holding and the suggested voluntary dismissal amendments, or the full task should be left to the General Assembly. Co-current amendments carry the risk of further confusion and implicate preemption issues if drafted inconsistently.

Edwards also suggests that in the event that a Hudson-type voluntary dismissal is taken, the plaintiff should include language precluding res judicata’s application on refiling in the court’s order. While this article endorses this approach, there is a danger that opposing counsel may object to this language or that such a move might alert inattentive defense counsel. It is also recommended that if the moving plaintiff’s attorney finds themselves in a Hudson-type position, it should be argued that defense counsel does not have a say in determining the conditions of a voluntary dismissal outside of those plainly set forth in section 2-1009. Unless trial or hearing has begun, opposing counsel should not be allowed to exercise any leverage over a plaintiff’s right to invoke a voluntary dismissal.

If the motion judge wavers on allowing such language, they should be reminded that the right to a voluntary dismissal is statutory, and that the failure to insert such language in the order allows the defendant to under-

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mine the operative effect of section 2-1009 upon refiling. If the court refuses this request, it should be asked that the refusal also be noted in the order, so that it is clear that plaintiff’s counsel was acting diligently. Plaintiff’s counsel in Hudson-type situations must take any and all measures to demonstrate on the record that they are being forced into a perilous situation.

Taking the holdings of Quintas and its progeny as well as Justice Garcia’s statements in Matejczyk into consideration, a voluntarily dismissing plaintiff must insert into their dismissal order language indicating that the non-suit is without prejudice and that plaintiff is granted leave to refile the action within one year. It should be considered extremely risky for plaintiff’s counsel to either check off a box on a form order or use language that is overly simple. For example, Figure Four represents a case management form order that is utilized in many Cook County courtrooms. Line 13 (code 4040) contains a space for counsel to indicate a voluntary dismissal is being invoked. If this space had been checked off and the order entered in a Hudson-type case, plaintiff’s counsel will arguably have committed malpractice and would risk being barred after the refiling of the action. To comply with Quintas, Estate of Green, and Severino, line 13 of the order should be checked off and the additional saving language included on line 12(G). Even though sections 2-1009 and 13-217 expressly contain the saving language, it should not be assumed that the courts will solely rely upon it, if such saving language is absent from the court order. While courts tend to abhor technical form over substance, attorneys must be aware that in a Rein/Hudson situation, the technical form of the order’s language may trump its substance if the case is refiled and a res judicata defense is mounted. This author recommends that judges who employ form orders, such as the discussed example or a derivative thereof, either add the requisite saving language or eliminate the option to check off a voluntary dismissal space altogether and force counsel to draft an accurate order. In this way, the court avoids complicity in a voluntary dismissal-type claim-splitting situation. Additionally, in light of the holding in Quintas, it is also strongly urged that a voluntarily dismissing plaintiff ask the trial or motion judge to note on the docket sheet that the non-suit is without prejudice and with leave to refile within one year.

Lastly, plaintiffs’ attorneys should be diligent in warning clients of the consequences that the rule against claim-splitting can have. In situations where a client disappears, attorneys, as a general matter of course, should make attempts to contact them both orally and by mail. It is suggested that in drafting client contact letters, specifically in partially adjudicated cases, plaintiffs’ attorneys should mention that if the client fails to contact or ap-

pear with the attorney by a specific or important court deadline, the case might be at risk of voluntary dismissal and the consequences of the rule against claim-splitting. Counsel might also consider incorporating such a warning in their attorney-client contracts if it is anticipated that a multiple count complaint will be filed. Taking affirmative measures to inform clients of their responsibilities that assist the attorney may help lessen the blow of any prospective legal malpractice claim that might flow from a Hudson-type voluntary dismissal.

IX. CONCLUSION

The rule against claim-splitting in Illinois has a long and arduous history. Its borders have been twisted and expanded to the point where the statutory rights of plaintiffs have run up against the public policy powers of the Illinois Supreme Court.

To its credit, the Illinois Supreme Court set out to establish an analytical model for res judicata/claim-splitting cases involving voluntary dismissals. First, a court must determine if res judicata even applies using the triple identity test. If that test is satisfied, the court must next look to see if any of the six equitable exceptions to the rule against claim-splitting set forth in section 26(1) of the Restatement (Second) of Judgments are triggered. What is unclear is under what exact circumstances the section 26(1)(b) exception will be triggered as we have seen through conflicting First District appellate decisions. Only time will determine whether more intra-appellate district splits surface.

Changes should be made to the Illinois voluntary dismissal and refiling statutes or to Illinois Supreme Court Rule 273. In order to prevent confusion that might accompany such amendments, Hudson should also be overruled. The Illinois Supreme Court should also revise its analytical framework for Hudson-type fact patterns and stringently apply equitable discretion as embodied by the exceptions found in the Restatement (Second) of Judgments. Such reformation of Illinois’ controversial claim-splitting jurisprudence would help restore substantive fairness over technical form—all the while preventing piecemeal appellate abuse.
TRADITIONAL CLAIMS-SPLITTING

Camp v. Morgan
21 Ill. 255 (1859)

Hamilton v. Quimby & Co.
46 Ill. 90 (1867)

Rogers v. Higgins
57 Ill. 244 (1870)

Ruegger v. I & St. L Ry.
103 Ill. 449 (1882)

Bailey v. Bailey
115 Ill. 551 (1886)

Harmon v. Auditor
123 Ill. 122 (1887)

Stickney v. Goudy
23 N.E. 1034 (1890)

In re Northwestern Univ.
206 Ill. 64 (1903)

"ENGLISH RULE" CASES

Brunsden v. Humphrey
L.R. 14 Q.B. 141 (1884)

Clancey v. McBride
169 N.E. 729 (1929)

Schmidt v. Modern American Woodsman
261 Ill. App. 276 (1931)

People v. Board of Trustees
15 N.E. 1 (1938)

Freeman & Co. v. Regan & Co.
76 N.E.2d 514 (1947)

Pratt v. Baker
223 N.E.2d 637 (1967)

Prochotsky v. Union Central Life
Ins. 276 N.E.2d (1971)

Shoemaker v. Geiger
331 N.E.2d 637 (1975)

Sjostrom v. McMurray
362 N.E.2d 744 (1979)

Radosta v. Chrysler Corp.
443 N.E.2d 670 (1982)

PIECEMEAL APPEALS

Baird & Warner v. Addison Indus.
387 N.E.2d 831 (1979)

Rein v. David A. Noyes
665 N.E.2d 1199 (1996)

Est. of Cooper v. Humana

Hudson v. City of Chicago
889 N.E.2d 210 (2008)

Piagentini v. Ford Motor Co.
901 N.E.2d 986 (2009)


Lane v. Kalchiem (2009)

Keifer v. Rust-Oleum et al. (2009)


Zurich Ins. Co. v. Amcast Indus.
743 N.E.2d 337 (2000)
(Statutory subrogation exception)

See 735 ILCS 5/2-405(d)

EXPANSION

Cartwright v. Moore (2009)
I. DOES THE RE-FILED CASE SATISFY THE RES JUDICATA "TRIPLE IDENTITY TEST"?

1. Final Judgment on the merits by a court of competent jurisdiction
2. Identity of causes of action (transactional test)
3. Identity of the parties or assigns

→ NO (Res Judicata Does Not Apply)

→ YES

DID PLAINTIFF APPEAL A PARTIAL JUDGMENT?

NO

Hudson v. City of Chicago

YES

Rein v. David A. Noyes

II. ARE ANY OF THE §26(1) EQUITABLE EXCEPTIONS OF THE RESTATEMENT (SECOND) OF JUDGMENTS SATISFIED?

(a.) The parties have agreed to terms or defendant has acquiesced
(b.) The court in the first action expressly reserved the plaintiff's right to maintain the second action
(c.) Plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms for relief in single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief
(d.) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim
(e.) For substantive policy reasons in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit and chooses the later course
(f.) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy

YES

Piagentini v. Ford Motor Co.
Quintas v. Asset Mgt. Group

NO

Rein v. David A. Noyes
Hudson v. City of Chicago
Jane Doe v. Gleicher
Lane v. Kalchiem
Kiefer v. Rust-Oleum et al.
Cartwright v. Moore

No Claims-Splitting

Claims-Splitting
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Plaintiff(s) v. Defendant(s)

Case No. ____________________________

Motion Call “________” Line #:

MASTER CALENDAR MOTION COURTROOMS CASE MANAGEMENT ORDER

(8230) 1. Category #1 (18 Month Discovery) (8232) 1a. Category #2 (28 Month Discovery)

(4296) 2. Written discovery & 213(f)(1) and (2) disclosures to be completed by ______________;

(4218) 3. Oral discovery & 213(f)(1) and (2) depositions to be completed by ______________;

(4218) 4. Treating physicians depositions to be completed by ______________;

(4288) 5. Subpoenas for treating physicians depositions to be issued by ______________;

(4296) 6. __________ shall complete outstanding written discovery by ______________;

(4218) 7. __________ shall be presented for deposition by ______________;

(4206) 8. Plaintiff/Defendant/Add. Party shall answer 213(f)(3) interrogatories by ______________;

(4218) 9. Plaintiff’s 213(f)(3) witnesses to be deposed by ______________;

(4218) 10. Defendant’s 213(f)(3) witnesses to be deposed by ______________;

(4218) 11. Additional party’s 213(f)(3) witnesses to be deposed by ______________;

(4619) 12. The matter is continued for subsequent Case Management Conference on ______________ at __________ AM/PM in Room __________ for:

(A) Proper Service    (B) Appearance of Defendants    (C) Case Value

(D) Pleading Status    (E) Discovery Status    (F) Pre-Trial/Settlement

(G) Other:

____________________________

(4005) 13. Case is dismissed for want of prosecution. (4040) The case is voluntarily dismissed under 735 ILCS 5/2-1009.

NOTICE:

* Failure of any party to comply with this Case Management Order will be a basis for Rule 219(c) sanctions.

* Failure of any party to enforce this Case Management Order will constitute a waiver of such discovery by that party.

* All cases arriving on the Trial Call in Courtroom 2005 must have all discovery in Lines 2 through 11 completed.

* A copy of this order is to be sent to each party by his/her counsel within 10 (ten) days of the initial Case Management Date.

Atty. No.: __________________________

Name: _____________________________________________

Atty. for: ____________________________

Address: __________________________________________

City/State/Zip: ____________________________

Telephone: ____________________________

ENTERED: ____________________________

Judge’s Stamp

JUDGE: ____________________________

Judge’s No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS